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Supreme Court, U.S.
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No.

IN THE
**Supreme Court of the United States**

SEATTLE COLLISION CENTER, INC.;
TODD M. SULLIVAN AND KAREN SULLIVAN,
*Petitioners,*

v.

AMERICAN STATES INSURANCE COMPANY;
AND SAFECO INSURANCE COMPANY OF AMERICA,
*Respondents.*

**On Petition For Writ of Certiorari**
**To The United States Court of Appeals**
**For The Ninth Circuit**

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The *Erie* Doctrine provides that a federal court sitting in diversity exceeds its Constitutional power when it fails to faithfully apply the law of the State. Recently, this Court has clarified that the pleading standard in all federal actions requires a complaint to allege sufficient facts to state a claim plausible on its face. The Supreme Court of Washington has considered and rejected the recently clarified federal pleading standard in favor of a more liberal notice pleading standard. The federal courts in this diversity action were called upon to decide whether the allegations in a complaint filed against petitioners in state court triggered the insurers' duty to defend under their insurance policies.

1. Whether the court of appeals erred in holding that the complaint in the underlying state court action failed to plead a claim triggering Safeco's duty to defend under the insurance policy at issue, affirming the district court's grant of summary judgment to Safeco.

2. Whether the court of appeals erred in affirming the district court's grant of summary judgment to Safeco that it had no duty to defend the underlying state court action based on its own resolution of an unsettled issue of Washington law, disregarding binding Washington Supreme Court authority that when coverage turns on an unsettled issue of law, the insurer must defend its insured.

## RULE 29.6 STATEMENT

In compliance with Rule 29.6, Seattle Collision Center, Inc., is an S corporation organized and existing under the laws of the State of Washington. SCC's sole shareholder is Todd M. Sullivan, and SCC is not publicly traded.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Seattle Collision Center, Inc., and Todd and Karen Sullivan (collectively "SCC") hereby petition for a writ of certiorari to review the decision and judgment of the Ninth Circuit Court of Appeals affirming the District Court's grant of summary judgment dismissal of SCC's claims in this case.

## ORDERS AND OPINIONS BELOW

The order of the District Court for the Western District of Washington, *Oregon Mutual Ins. Co. v. Seattle Collision Center, Inc.; Todd M. Sullivan; Karen Sullivan v. American States Ins. Co.; Safeco Ins. Co. of America*, Cause No. C08-1670 JLR, as amended, was entered on October 28, 2010, and is not published in the federal reporter. A-6–A-38. The unpublished memorandum opinion of the Ninth Circuit is *Oregon Mutual Ins. Co. v. Seattle Collision Center, Inc.; Todd M. Sullivan; Karen Sullivan v. American States Ins. Co.; Safeco Ins. Co. of America*, Case No. 09-36105 (2010), entered on November 16, 2010, which affirmed the District Court's order on summary judgment in all respects. A-3–A-5. The Ninth Circuit's order denying SCC's petition for rehearing and petition for rehearing *en banc* was entered on December 28, 2010. A-1–A-2.

## STATEMENT OF JURISDICTION

This case was filed on November 17, 2008, by plaintiff Oregon Mutual Insurance Company ("OMI") in the United States District Court for the Western District of Washington, asserting diversity jurisdiction

pursuant to 28 U.S.C. §1332(a)(1) because OMI is a citizen of the State of Oregon and Seattle Collision and the Sullivans are citizens of the State of Washington. *See* A-11.

SCC filed a third party complaint against third party defendants American States Insurance Company, which is an Indiana corporation, and Safeco Insurance Company of America, which is a Washington corporation, asserting supplemental jurisdiction under 28 U.S.C. §1367(a). *See id.*

By an amended complaint filed on February 17, 2009, OMI added as additional defendants the plaintiffs in the Underlying Lawsuit, Enodis Corporation, a Delaware corporation with a principle place of business in the State of Florida, and Belshaw Bros., Inc., a Delaware corporation with a principle place of business in Auburn, Washington. The addition of these defendants, who were later dismissed, did not affect diversity jurisdiction under 28 U.S.C. §1332(a)(1).

All causes of action were brought under Washington law. *See* A-11. The district court had supplemental jurisdiction over causes of action under state law under 28 U.S.C. §§ 1367(a) & 1441(c).

The Ninth Circuit had appellate jurisdiction under 28 U.S.C. §§1291 & 1294(1) because Seattle Collision appealed from a final judgment of dismissal from a United States district court situated within the embrace of Ninth Circuit jurisdiction.

This Court has jurisdiction to consider this petition pursuant to 28 U.S.C. §1254(1).

## STATEMENT OF THE CASE

### A. The Underlying Lawsuit in Washington State Court.

In October 2007, SCC was sued in the Superior Court for the State of Washington under the Washington Model Toxics Control Act ("MTCA"), RCW 70.105D *et seq.*, and the Washington Declaratory Judgment Act, RCW 7.24.010 *et seq.* ("the Underlying Lawsuit"). A-38–A47. The Underlying Lawsuit was brought by the owners of a neighboring property, who asserted that SCC was a Potentially Responsible Party ("PRP") because various "Volatile Organic Compounds" ("VOCs"), including primarily perchloroethylene, commonly known as "PERC," had been found on the plaintiff's property and that the PERC had originated on the SCC property before and/or during SCC's ownership of the property. A-39–A-43.

### B. SCC's Coverage Dispute with Its Insurers.

SCC tendered the Underlying Lawsuit to its insurers, Oregon Mutual Insurance ("OMI"), Safeco Insurance Company of America, and Safeco's wholly owned subsidiary, American States Insurance Company (Safeco and American States will be referred to collectively as "Safeco"), all of whom – at least initially – denied coverage based on a so-called Absolute Pollution Exclusion in each of their insurance policies. *See* A-10–A-11. Through counsel, SCC challenged the denials and, eventually, OMI agreed to defend SCC under a reservation of rights. Safeco

maintained its denial of either a duty to defend or indemnify SCC for the claims asserted under any of the policies it issued to SCC. *See id.*

After agreeing to defend SCC in the Underlying Lawsuit, OMI instituted the present action in the United States District Court for the Western District of Washington, asserting diversity jurisdiction under 28 U.S.C. §1332(a), and seeking a declaration that it owed no duty to either defend or indemnify SCC. A-11. SCC answered, counterclaimed, and filed a third party complaint against Safeco, asserting claims for breach of contract, common law insurance bad faith, violations of the Washington Consumer Protection Act ("CPA"), violations of the Washington Insurance Fair Conduct Act ("IFCA"), and common law negligence. *Id.* Safeco then counterclaimed against SCC for a declaration of no coverage and no duty to defend.

OMI and SCC subsequently settled and dismissed their claims against each other, which included a settlement of the underlying lawsuit, but not payment of fees and costs incurred by SCC prior to OMI's acceptance of defense and appointment of its assigned counsel. Thus, SCC still had unpaid damages arising from Safeco's refusal to defend or indemnify it.

### C. The District Court Order on Summary Judgment and Ninth Circuit Opinion.

Safeco brought a motion for summary judgment against SCC, asserting that Safeco had no duty to defend or indemnify SCC against the underlying lawsuit because all claims asserted against SCC in the Underlying Lawsuit were purportedly excluded from coverage by the pollution exclusion in the respective

insurance policies. A-11. SCC argued in opposition to Safeco's motion that the complaint in the underlying state court case sufficiently pled a claim for consequential damages, including "natural resource damages" under the Washington MTCA, which – at least arguably – fall within the restored coverage of the modified pollution exclusion present in two of the insurance policies at issue. A-20, A-22–A-23. While skeptical that the complaint pled a claim for natural resource damages, the District Court did not explicitly reject this argument. A-23. Instead, it concluded that it "need not resolve this issue" because, under its own interpretation of the modified pollution exclusion, claims for non-remediation damages, *i.e.*, consequential damages, including those for natural resource damages under the Washington MTCA, were excluded from coverage in any event. *See id.*

On appeal to the Ninth Circuit, SCC reasserted both that the complaint in the underlying case pled a claim for natural resource damages sufficient to trigger the insurers' duty to defend and that the modified pollution exclusion at issue provided coverage for those claims. Nevertheless, the Ninth Circuit affirmed the district court's order, holding:

> The facts alleged in the underlying complaint do not give rise to a duty to defend. The allegations arise solely out of Washington's Model Toxics Control Act and only claim past and future remedial action costs associated with

> traditional environmental pollution. Safeco's pollution exclusion clauses, as interpreted under Washington law, clearly and unambiguously exclude liability for such traditional environmental harms.

A-5, *citing Kent Farms, Inc. v. Zurich Ins. Co.*, 998 P.2d 292, 295-96 (Wash. 2000).

The Ninth Circuit's conclusion that the complaint in the Underlying Lawsuit stated a claim only for "remedial action costs" and not natural resource damages is a rejection of SCC's argument that the complaint also sufficiently pled a claim for "natural resource damages" against SCC under Washington's MTCA. Its decision conflicts in at least two respects with the *Erie* Doctrine articulated by this Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and its progeny.

First, both the district court and Ninth Circuit panel disregarded the established law of Washington governing an insurer's duty to defend its insured when coverage turns on an unsettled issue of law, as, contrary to its holding, it is undisputed that the clauses at issue have never been "interpreted under Washington law." *See* A-19–A-20, fn. 7.

Second, the Ninth Circuit failed to apply the liberal notice pleading standard of the State of Washington to hold that the allegations in the complaint in the Underlying Lawsuit "only claim past and future remedial action costs associated with traditional environmental pollution," and were,

therefore, "clearly and unambiguously" excluded from coverage. A-5. Both holdings violate the *Erie* Doctrine.

## ARGUMENT

As SCC will discuss in detail, the Ninth Circuit opinion affirming the district court's rulings on summary judgment so far departs from the accepted and usual course of judicial proceedings in applying state law in diversity cases, or sanctioned such a departure by the district court, as to require the exercise of this Court's supervisory power to re-affirm the continuing vitality of the *Erie* Doctrine. *See* SUP. CT. R. 10.

### A. The *Erie* Doctrine Requires a Federal Court Sitting in Diversity to Apply the Law of the State.

The issues on this petition are fairly straightforward. They turn on whether the *Erie* Doctrine has continuing vitality in federal jurisprudence and whether federal courts must apply state law as interpreted by the state's highest court. In *Erie*, this Court rejected the doctrine of *Swift v. Tyson*, 16 Pet. 1, 18, 10 L.Ed. 518 (1842), which held that federal courts sitting in diversity were "free to exercise an independent judgment as to what the common law of the state is – or should be." *Erie*, 58 U.S. at 819. Rather, the Court in *Erie* held that the doctrine of *Swift v. Tyson* overstepped the constitutional bounds of the federal courts. *Id.* at 822. The Court's quotation of Mr. Justice Holmes in support

of the decision could not be clearer:

> The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.

*Erie*, 58 U.S. at 823, *quoting Black & White Taxicab, etc., Co. v. Brown & Yellow Taxicab, etc., Co.*, 276 U.S. 518, 532-536, 48 S.Ct. 404, 408, 409, 72 L.Ed. 681 (1928) (Holmes, J., dissenting); *citing Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370-372, 30 S.Ct. 140, 54 L.Ed. 228 (1910) (Holmes, J., dissenting).

The *Erie* Doctrine is rooted in concepts of fairness, with its twin aims of "discouragement of forum shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 468, 467, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). "The Erie rule is rooted in part in a realization that it would be unfair for the character of result of a litigation materially to differ because the suit had been brought in federal court." *Hanna*, 380 U.S. at 467. Thus, not only is a federal court sitting in diversity required to apply the substantive law of the state, it must interpret and apply the law in accordance with the state's legislative enactments and holdings of the state's highest court. *See Erie*, 58 U.S. at 823.

Fundamentally, then, petitioners seek a directive from this Court to the federal courts below to faithfully apply the governing Washington law to the

facts of this case in the same manner as it would be applied by a Washington court.

### B. Washington Courts Apply a Liberal Notice Pleading Standard Substantially Different from Federal Pleading Requirements.

Both the district court and the Ninth Circuit panel may have anticipated that the pleading standard in Washington would be modified in accordance with this Court's decisions in *Ashcroft v. Iqbal*, —U.S.—, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). In *Twombly*, this Court clarified the standard for measuring the sufficiency of a complaint as requiring "only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. In doing so, the Court rejected the then oft-cited quotation from *Conley v. Gibson* that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Twombly*, 550 U.S. at 561, *quoting Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). In *Iqbal*, this Court further clarified that the standard set out in *Twombly* is the pleading standard in all federal cases, not just in particular types of cases such as *Twombly* (antitrust) or *Iqbal* (civil rights). *See Iqbal*, –U.S.–, 129 S.Ct. at 1953 ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike.") (internal citation omitted).

Washington generally does look to federal court interpretations of the equivalent federal rules for guidance on the interpretation of similar Washington civil rules. *See Pickett v. Holland America Line-Westours, Inc.*, 35 P.3d 351, 356 (Wash. 2001) (holding "federal cases interpreting the analogous federal provision are highly persuasive."); *Gillett v. Connor*, 133 P.3d 960, 962-3 (Wash.Ct.App. 2006) ("When the language of a Washington rule and its federal counterpart are the same, courts look to decisions interpreting the federal rule for guidance."). Nevertheless, in an opinion issued during the pendency of the present appeal, but after briefing to the Ninth Circuit was complete, the Washington State Supreme Court flatly rejected the pleading standard recently clarified by this Court, requiring that "the claim is plausibly based on the factual allegations in the complaint – a more difficult standard to satisfy." *McCurry v. Chevy Chase Bank*, 233 P.3d 861, 862-64 (Wash. June 24, 2010).

In analyzing and rejecting the reasoning underlying the perceived change in the federal pleading standard, the Washington Supreme Court concluded that, "[w]e thus have no similar basis to fundamentally alter our interpretation of CR 12(b)(6) that has been in effect for nearly 50 years, and we decline to do so here." *Id.* (internal citation omitted). Accordingly, Washington retained its more liberal standard that "a plaintiff states a claim upon which relief can be granted if it is *possible* that facts could be established to support the allegations in the complaint." *McCurry*, 233 P.3d at 862 (emphasis in original), *citing Halvorson v. Dahl*, 574 P.2d 1190 (Wash. 1978); *Christensen v. Swedish Hosp.*, 368 P.2d

897 (Wash. 1962) (*citing Conley v. Gibson*, 355 U.S. at 78). As the Washington Supreme Court has held in an earlier case, this is an extremely broad standard:

> "Any hypothetical situation conceivably raised by the complaint defeats a 12(b)(6) motion if it is legally sufficient to support plaintiff's claim." *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978). Hypothetical facts may be introduced to assist the court in establishing the "conceptual backdrop" against which the legal sufficiency of the claim is considered. *Brown v. MacPhersons, Inc.*, 86 Wn.2d 293, 298 n. 2, 545 P.2d 13 (1975).
>
> We have held that in determining whether such facts exist, a court may consider a hypothetical situation asserted by the complaining party, not part of the formal record, *including facts asserted for the first time on appellate review* of a dismissal under the rule. *Halvorson*, 89 Wn.2d at 675, 574 P.2d

> 1190. Neither prejudice nor unfairness is deemed to flow from this rule, because the inquiry on a 12(b)(6) motion is whether any facts which can support a valid claim can be conceived. *See Halvorson*, 89 Wn.2d at 674-75, 574 P.2d 1190.

*Bravo v. Dolson Cos.*, 888 P.2d 147, 150 (Wash. 1995) (emphasis in original). Thus, Washington and federal pleading standards differ, with Washington retaining its more liberal notice pleading standard and the corresponding dichotomy between operation of Washington Civil Rules 8(a) and 12(b).

### C. Under Washington Pleading Rules the Complaint in the Underlying Lawsuit Adequately Pled a Claim for Natural Resource Damages and Other Consequential Damages Arguably Covered Under the Insurance Policies at Issue.

Under Washington notice pleading rules, only a "concise statement of the claim and the relief sought" is required. *Champagne v. Thurston County*, 178 P.3d 936, 945 (Wash. 2008), *citing Pac. NW. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276 (Wash. 2006). A complaint fails to meet this standard only "if it neglects to give the opposing party 'fair notice.'" *Champagne*, 178 P.3d at 945; *see also, Burchfiel v. The Boeing Corp.*, 205 P.3d 145, 158

(Wash.Ct.App. 2009). While this is facially the same as the standard described by this Court with regard to Federal Rule 8(a) in *Twombly* and *Iqbal*, Washington courts apply it quite differently to complaints filed in Washington courts.

In the *Champagne* case, the plaintiff brought claims for unpaid wages, alleging violations of the Washington Minimum Wage Act, chapter 49.46 RCW ("MWA"), the Wage Payment Act, chapter 49.48 RCW ("WPA"), and the Wage Rebate Act, chapter 49.52 RCW ("WRA"). 178 P.3d at 939. However, the Washington Court of Appeals excluded claims under the MWA and WPA because, although the plaintiff alleged violations of those chapters, "they failed to request any form of relief under these other wage statutes that differs substantively from [WRA] relief." 178 P.3d at 945 (citations omitted). On appeal to the Washington Supreme Court, the County argued that the court should "honor Champagne's 'intentional' omission of a request for damages under the MWA and WPA." *Id.*

In response, the plaintiff argued:

> that the reference to relief contained under each separate cause of action puts the County on notice of his MWA and WPA claims. He also contends that the concluding phrase of his prayer for relief ("[f]or such other relief as the Court deems just and equitable") sufficiently apprises the

> county of his request for relief under the MWA and WPA.

*Champagne*, 178 P.3d at 945-6. The Washington Supreme Court agreed.

In holding that the plaintiff's complaint did not "transgress the liberal bounds of the notice pleading standard," the court also held that even an "intentional omission of a particular prayer for relief is immaterial." *Id.* at 946.

> [T]he complaint, and other relief-claiming pleadings need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided. However, the complaint must contain ... direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader.

*Id.* at fn. 16, *quoting Berge v. Gorton*, 88 Wn.2d 756, 763, 567 P.2d 187 (Wash. 1977) (*quoting* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §1216 at 120 (1969)).

Similarly, in *Burchfiel*,

> The original complaint did not specifically seek recovery for loss of consortium. It prayed instead for damages "including, but not limited to" wage loss and emotional distress and further prayed generally for "such other and further relief as deemed just, lawful, and equitable by the Court." The notice here was legally sufficient.

*Burchfiel*, 205 P.3d 145, 158 (Wash.Ct.App. 2009) (internal citation omitted). Here, the complaint in the Underlying Lawsuit is analytically indistinguishable.

The complaint in the Underlying Lawsuit alleged and requested in pertinent part:

- That SCC owned property adjacent to the contaminated Site. ¶12.
- That SCC and the Sullivans "are believed to be storing utilizing, generating, and disposing of hazardous substances, including VOCs, during their ownership, lease, and/or operation of the SCC property." ¶15.
- That VOCs are migrating to the Enodis property from the SCC property. ¶¶16-17.

- That remedial action is required at the Site. ¶ 23.
- That SCC and the Sullivans are "potentially liable persons" under the Washington MTCA. ¶24.
- That plaintiff Enodis has the right under the Washington MTCA to recover from SCC and the Sullivans "all remedial action costs ***and all natural resource damages arising from the releases or threatened releases of hazardous substances.***" ¶ 28.
- That the court award "[s]uch other relief as the Court finds just and equitable under the circumstances." Requested Relief, ¶5.

A-39–A-47 (emphasis added).

SCC does not dispute that the complaint in the Underlying lawsuit does not *explicitly demand* natural resource damages or other consequential damages; clearly, the prayer for relief does not mention them specifically. *See* A-46–A-47. Nevertheless, as the *Champagne* court held, that is "immaterial" to whether there was sufficient notice of such a claim under Washington law. 178 P.3d at 946. And here, notice of a claim for natural resource damages or other consequential damages is at least as strong as the allegedly "intentional omission" from the prayer for relief of a request for *any damages* as to two of the statutes at issue in *Champagne*. Thus, under Washington law, plaintiffs' assertion of the *right* to natural resource damages, even without pleading the *fact* of having incurred such damages, was sufficient

under Washington law to provide SCC and its insurers fair notice of a claim for natural resource damages.

It is not disputed that the complaint in the Underlying Lawsuit pled a claim for liability and damages under the Washington MTCA. Unlike the *Champagne* case, the issue in this case is with the *category* of damages explicitly requested under the statute, *i.e.*, remedial action costs, not that no damages were explicitly requested at all, as in *Champagne*. The Ninth Circuit apparently concluded that an explicit demand for remedial action costs effectively precluded a claim for any other form or category of damages not explicitly demanded, including natural resource and/or other consequential damages. In effect, they read out of the complaint's prayer for relief the request for "[s]uch other relief as the Court finds just and equitable under the circumstances." A-47. Respectfully, this conclusion is in direct conflict with the applicable law in this case, that of the State of Washington as stated by the Washington Supreme Court in *Champagne* and recently reaffirmed in *McCurry*.

Under controlling *Washington* authority, the complaint in the underlying Washington superior court action meets Washington's liberal notice pleading standard, *i.e.*, the complaint in the underlying state superior court action pled sufficient facts, applicable law, and a prayer for relief that, if the facts alleged proved to be true, the plaintiff gave "fair notice"of, and could recover on, a claim for "natural resource damages" under the Washington MTCA or other consequential damages. *See, e.g., Champagne*, 178 P.3d at 945-46; *Burchfiel*, 205 P.3d at 158; *see also, Prudential Prop. & Casualty Co. v. Lawrence*, 724

P.2d 418, 423 (Wash.Ct.App. 1986). The apparent application of the more recent federal pleading standards in this case improperly denied SCC the protections and benefits of Washington law and is in direct conflict with this Court's holding in *Erie*.

In this case, the Ninth Circuit appears to have applied the more stringent federal pleading standard requiring the pleading of facts establishing a claim for natural resource damages or other consequential damages "plausible on its face," rather than the "under any set of facts" standard of Washington because the complaint did not specifically plead the fact of natural resource damages, only the statutory right to recover them. *See* A-44, ¶28. It thereby reached a decision on an issue of Washington law that is clearly contrary to the result that would be reached on the same facts in the courts of the State of Washington. Therefore, the Ninth Circuit's holding that the underlying complaint pled a claim only for remedial action damages and, therefore, the insurance policies at issue did not conceivably provide coverage for defense of the underlying lawsuit should be reviewed by this Court and reversed.

### D. Application of the Federal Standard Requiring Pleading of Sufficient Facts to State a Claim "Plausible on Its Face" in Place of Washington's "Any Possible Facts" Standard Significantly Affected the Outcome of the Litigation.

It makes no difference that the law at issue is the procedural law, rather than the substantive law, of Washington. The Ninth Circuit's failure to apply

Washington's more liberal notice pleading standard in analyzing the complaint in the Underlying Lawsuit did not just "significantly affect the result of a litigation," it was essentially dispositive of the case. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945). As this Court stated in *York*:

> The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of a State court a block away, should not lead to a substantially different result.

*Id.* What transpired in this case led to a substantially different result than the result that would be obtained in the courts of Washington.

Under Washington law, "[t]he duty to defend is triggered if the insurance policy *conceivably covers* allegations in the complaint." *Am. Best Food*, 229 P.3d at 696 (emphasis in original), *citing Woo*, 164 P.3d at 495. As the Washington Supreme Court stated in *Woo*:

> In sum, the duty to defend is triggered if the insurance policy conceivably covers the allegations in the complaint, whereas the duty to indemnify exists

> only if the policy *actually covers* the insured's liability.

*Woo*, 164 P.3d at 696 (emphasis in original). Thus, to the extent the complaint in the Underlying lawsuit at least arguably pled a claim for natural resource and/or other consequential damages under Washington law, there conceivably was coverage under the insurance policy, and Safeco had a duty to defend.

The Ninth Circuit's application of the more stringent federal pleading standard to hold that the complaint in the Underlying Lawsuit "only claim[ed] past and future remedial action costs," which SCC had already conceded were excluded under the policies, was determinative of the outcome. A-5. Therefore, under the *Erie* Doctrine, the district court and the Ninth Circuit were required to analyze the complaint in the Underlying Lawsuit under the Washington pleading rules, not the federal "plausible claim" standard, and the failure to do so was error.

### E. The District Court Substituted Its Own View of What the Law of Washington Is or Should Be in Place of Binding Washington Supreme Court Holdings on an Insurer's Duty to Defend Its Insured When Coverage Turns on an Unsettled Issue of Law.

The Ninth Circuit avoided review of the district court's actual ruling, instead holding that the complaint in the Underlying Lawsuit pled "only a claim for remedial action costs" – a ruling the district

court declined to make – and that "Safeco's pollution exclusion clauses, as interpreted under Washington law, clearly and unambiguously exclude liability for such traditional environmental harms." A-5, *citing Kent Farms, Inc. v. Zurich Ins. Co.*, 140 Wn.2d 396, 400-02, 998 P.2d 292, 295-96 (Wash. 2000). However, it was undisputed in the district court that no Washington court had considered the modified pollution exclusion clauses at issue on the motion for summary judgment. *See* A-19–A-20, fn. 7. Thus, *Kent Farms* was not on point to the modified exclusion before the court.

The actual basis on which the district court granted summary judgment, *i.e.*, that Safeco had no duty to defend SCC because the modified pollution exclusion at issue clearly excluded coverage for both remedial action damages and natural resource damages under the Washington MTCA, was a paradigm violation of the *Erie* Doctrine.

The Supreme Court of Washington has repeatedly held that when Washington courts have yet to rule on a particular legal issue on which coverage depends, there is "legal uncertainty" with regard to the duty to defend, and "any uncertainty works in favor of providing a defense to the insured." *Am. Best Food v. Alea of London, Ltd.*, 229 P.3d 693, 697-98 (Wash. 2010), *citing Truck Ins. Exch. v. Vanport Homes, Inc.*, 58 P.3d 276, 282 (Wash. 2002) ("If coverage is not clear from the face of the complaint but may exist, the insurer must investigate the claim and give the insured the benefit of the doubt in determining whether the insurer has an obligation to defend."); *see Woo v. Fireman's Fund Ins. Co.*, 164 P.3d 454, 462-63 (Wash. 2007).

The particular exclusionary language initially submitted by Safeco and considered by the district court and the Ninth Circuit is from the last Safeco policy, for the 2004-05 policy year, policy no. 01-CG-501146-1. *See* A-19–22; A-56–62. The pollution exclusion, parts (1) and (2) of Section f, provides in pertinent part:

> 2. Exclusions
>
> f. Pollution
>
> (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":
>
> (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured.
>
> (2) Any loss, cost or expense arising out of any:
>
> (a) Request, demand, order or statutory or regulatory requirement that any insured or other

test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

A-56–62. It is the undesignated final paragraph above that has been variously described as the "exception" to the exclusion or Section f.(2) as a whole as the

"modified pollution exclusion," which is modified by the "exception" detailed in the final paragraph.

SCC argued and maintained that the modified pollution exclusion at issue in the Safeco policies restored at least some coverage for "damages because of 'property damage,'" *i.e.*, consequential damages, including, but not limited to, natural resource damages. A-22–23. Both parties submitted non-Washington authorities to support their respective positions on the interpretation of the insurance provision at issue, and the district court recognized that no Washington court had considered the issue. A-19–20, fn. 7, *citing Hussey Copper, Ltd. v. Royal Ins. Co.*, 567 F.Supp.2d 774 (W.D.Pa. 2008); *Mid-Continent Cas. Co. v. Third Coast Packaging Co., Inc.*, 342 F.Supp.2d 626 (S.D.Tx. 2004); *Whittier Props., Inc. v. Alaska Nat'l Ins. Co.*, 185 P.3d 84 (Alaska 2008); *Clean Harbors Envtl. Serv., Inc. v. Boston Basement Techs., Inc.*, No. 1075, 2008 WL 534536 (Mass. App. Ct. Feb. 26, 2008). Despite the fact that the "parties analyze[d] these cases in depth," the district court concluded that its own interpretation would determine the outcome with regard to Safeco's duty to defend. A-19–20, fn. 7; A-24–25. This, respectfully, violated the *Erie* Doctrine, as it was directly contrary to governing Washington law holding that when Washington law is unsettled on a particular issue and there are non-Washington authorities contrary to the insurer's position, the insurer must defend. *See, e.g., Am. Best Food, Inc. v. Alea London, Ltd.*, 229 P.3d at 699-700; *see Woo*, 164 P.3d at 462-63; *Truck Ins.*, 58 P.3d 282.

In short, it is irrelevant whether Safeco's interpretation of the modified pollution exclusion at issue was correct; the only relevant inquiry is whether

the issue on which coverage turned was unsettled in Washington at the time Safeco denied a defense. *See ids.* Yet, the district court disregarded well-settled Washington law to validate Safeco's refusal to defend its insured because the district court agreed with the denial of coverage. *See* A-23; *but see Coventry Associates v. Am. States Ins. Co.*, 961 P.2d 933 (Wash. 1998) (holding "an insured may maintain an action against its insurer for bad faith investigation of the insured's claim and violation of the [Washington Consumer Protection Act] regardless of whether the insurer was ultimately correct in determining coverage did not exist."). Thus, the district court violated the *Erie* Doctrine by substituting its own view of what the law of Washington is or should be for that of the settled holdings of the Washington Supreme Court with regard to an insurer's duty to defend its insured.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[DATE STAMP]
DEC 28 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

OREGON MUTUAL INSURANCE COMPANY,
Plaintiff,

v.

No. 09-36105
D.C. No. 2:08-cv-01670-JLR
Western District
of Washington, Seattle

SEATTLE COLLISION CENTER INC; et al.,
Defendants-third-party-plaintiffs - Appellants,

v.

AMERICAN STATES INSURANCE COMPANY and SAFECO INSURANCE COMPANY OF AMERICA,
Third-party-defendant - Appellees.

## ORDER

Before: THOMAS and M. SMITH, Circuit Judges, and EZRA, District Judge.*

The panel has voted to deny the appellants' petition for rehearing. Judges Thomas and Smith have voted to reject the appellants' petition for rehearing en banc and Judge Ezra so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The appellants' petition for rehearing is denied and the appellants' petition for rehearing en banc is rejected.

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*The Honorable David A. Ezra, District Judge for the U.S. District Court for Hawaii, Honolulu, sitting by designation.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[DATE STAMP]
NOV 16 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

OREGON MUTUAL INSURANCE COMPANY,
Plaintiff,

v.

No. 09-36105
D.C. No. 2:08-cv-01670-JLR

SEATTLE COLLISION CENTER INC; et al.,
Defendants-third-party-plaintiffs - Appellants,

v.

AMERICAN STATES INSURANCE COMPANY and SAFECO INSURANCE COMPANY OF AMERICA,
Third-party-defendant - Appellees.

Appeal from the United States District Court
for the Western District of Washington
James L. Robart, District Judge, Presiding

## MEMORANDUM*

Argued and Submitted October 4, 2010
Seattle, Washington

Before: THOMAS and M. SMITH, Circuit Judges, and EZRA, District Judge.**

Seattle Collision Center Inc. and its principal owners, Todd and Karen Sullivan (collectively "SCC"), appeal the district court's judgment granting in part and denying in part the motion for summary judgment brought by third-party defendants American States Insurance Company and Safeco Insurance Company of America (collectively "Safeco"). We affirm. Because the parties are familiar with the factual and procedural history of this case, we need not recount it here.

I

Contrary to SCC's assertion, the district court had the power to exercise supplemental jurisdiction, even though it had resolved the claims over which it had original jurisdiction. 28 U.S.C. § 1367(a). Therefore, retaining supplemental jurisdiction in this case was a proper exercise of discretion by the district court. *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1000

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*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

**The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

(9th Cir. 1997).

II

The district court properly granted summary judgment on SCC's claims. "The duty to defend arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage." *Am. Best Foods, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404-05, 229 P.3d 693, 696 (Wash. 2010) (quotations omitted). The facts alleged in the underlying complaint do not give rise to a duty to defend. The allegations arise solely out of violations of Washington's Model Toxics Control Act and only claim past and future remedial action costs associated with traditional environmental pollution. Safeco's pollution exclusion clauses, as interpreted under Washington law, clearly and unambiguously exclude liability for such traditional environmental harms. *Kent Farms, Inc. v. Zurich Ins. Co.*, 140 Wn.2d 396, 400- 02, 998 P.2d 292, 295-96 (Wash. 2000).

III

The district court did not improperly allocate the burden of proof. *McDonald v. State Farm Fire and Cas. Co.*, 119 Wn.2d 724, 731, 837 P.2d 1000, 1003-05 (Wash. 1992). It did not abuse its discretion in striking the sur-reply brief. SCC has had a full opportunity to present its arguments to us on the merits.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OREGON MUTUAL INSURANCE COMPANY,

Plaintiff,

v. CASE NO. C08-1670JLR

SEATTLE COLLISION CENTER, INC., et al.,

Defendants.

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SEATTLE COLLISION CENTER, INC., et al.,

Third-Party Plaintiffs,

v.

AMERICAN STATES INSURANCE COMPANY, et al.,

Third-Party Defendants.

## AMENDED ORDER[1]

This matter comes before the court on Third-Party Defendants American States Insurance Company and Safeco Insurance Company of America's (collectively, "Insurers") motion for summary judgment (Dkt. # 33). Having reviewed the motion, as well as all papers filed in support and opposition, and deeming oral argument unnecessary, the court GRANTS in part and DENIES in part the motion for summary judgment (Dkt. # 33).

## I. BACKGROUND

Defendant and Third-Party Plaintiff Seattle Collision Center, Inc. ("Seattle Collision") owns and operates an auto repair and painting business on property located at 1752 Rainier Avenue South ("SCC Property") in Seattle, Washington. (Am. Compl. (Dkt. # 22) ¶¶ 3.1-3.3; Answer to Am. Compl. & Third-Party Compl. ("2d Third-Pty. Compl.") (Dkt. # 25) ¶ 13.1.) Defendants and Third-Party Plaintiffs Todd M. Sullivan and Karen Sullivan (collectively, "the Sullivans") are the principals and owners of Seattle Collision. (2d Third-Pty. Compl. ¶ 10.2.) The neighboring property located at 1750 22nd Avenue South ("Belshaw Property") in Seattle, Washington, is owned and/or leased by Enodis Corporation ("Enodis") and/or Belshaw Brothers, Inc. ("Belshaw") (collectively,

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[1]This order amends the court's order of September 18, 2009 (Dkt. # 68).

"Underlying Plaintiffs"). American States and Safeco insured Seattle Collision from March 27, 1998, to June 2, 2005.

On June 24, 2004, Underlying Plaintiffs notified Seattle Collision and the Sullivans that they were potentially liable for remediation costs under Washington's Model Toxic Control Act ("MTCA"), RCW § 70.105D, *et seq.* (Declaration of Kimberly Chong ("Chong Decl.") (Dkt. # 34), Ex. H.) In the letter, Underlying Plaintiffs demanded that Seattle Collision and the Sullivans investigate and remediate contamination of soils and groundwater on the Belshaw Property caused by the alleged release of volatile organic compounds, specifically tetrachloroethene, also known as perchloroethylene ("perc")[2], from the SCC Property. (*Id.*); *see also Westfarm Assoc. Ltd. P'ship v. Wash. Suburban Sanitary Comm'n*, 66 F.3d 669, 673 (4th Cir. 1995).

Seattle Collision notified the Insurers of the Underlying Plaintiffs' letter. (Chong Decl., Ex. G.) The Insurers received the notice on July 7, 2004, and Kimberly Chong, a claims representative for the Insurers, discussed the claim with Mr. Sullivan on the same day. (Declaration of Barbara L. Bollero ("Bollero Decl.") (Dkt. # 40-2), Ex. A (Excerpts of the Deposition of Kimberly Chong ("Chong Dep.")) at 144; *see* Chong

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[2]Underlying Plaintiffs initially refer to tetrachloroethene in their June 24, 2004 letter, but subsequently refer to perc in their 2007 lawsuit, as discussed below. For purposes of this order, the court will refer to the pollutant at issue as perc.

Decl. ¶ 6 & Ex. I.) In their conversation, Mr. Sullivan told Ms. Chong that he did not use pollutants in his business operations. (Chong Decl. ¶ 6 & Ex. I.) He further explained other reasons why he believed Seattle Collision was not responsible for the contamination, including that Seattle Collision used only one gallon of aerosol degreaser per month and had a solid four-inch concrete slab floor, that the prior owner operated a dry cleaning business that would have used pollutants, and that there were manufacturing operations on the Belshaw Property. (Chong Decl., Ex. I.) At the end of the conversation, Ms. Chong advised Mr. Sullivan that the insurance policies excluded coverage for pollution claims and informed him that she would be sending a coverage declination letter. (Chong Decl. ¶ 6 & Ex. I.) On July 21, 2004, the Insurers formally notified Seattle Collision that the insurance policies did not cover the claim. (Chong Decl., ¶ 7 & Ex. J.) In the declination letter, Ms. Chong cited both versions of the pollution exclusion clauses contained in the insurance policies as the basis for the denial of coverage. (Chong Decl., Ex. J.)

On October 19, 2007, Underlying Plaintiffs filed suit against Seattle Collision and the Sullivans, among others, in the Superior Court for King County, Washington, in *Enodis Corp. v. Seattle Collision Center, Inc.*, Case No. 07-2-33766-1KNT ("Underlying Lawsuit"). (Am. Compl., Ex. 1 (Underlying Compl.).) In their complaint ("Underlying Complaint"), Underlying Plaintiffs seek past and future remedial action costs for alleged contamination of soils and groundwater

caused by the release of volatile organic compounds, specifically perc and its degradation compounds, from the SCC Property to the Belshaw Property. (Underlying Compl. ¶¶ 10-19.) Underlying Plaintiffs assert two causes of action. First, under the MTCA, Underlying Plaintiffs allege that Seattle Collision and the Sullivans are "strictly liable, jointly and severally, for all 'remedial action' costs, within the meaning of RCW 70.105D.020(21), incurred by [Underlying Plaintiffs] arising from the releases or threatened releases of these hazardous substances." (Underlying Compl. ¶ 28.) Second, under the MTCA and Washington's Declaratory Judgment Act, RCW 7.24.010 et seq., Underlying Plaintiffs request a declaratory judgment that Seattle Collision and the Sullivans are responsible for and shall pay all future remedial action costs. (*Id.* ¶ 33.)

On December 8, 2007, Seattle Collision and the Sullivans tendered the Underlying Lawsuit to the Insurers. (Chong Decl., Ex. K.) On December 14, 2007, Ms. Chong acknowledged receipt of the tender, noted that the Insurers had previously declined coverage, provided Seattle Collision and the Sullivans with copies of the insurance policies, and indicated that the Insurers would reply by separate letter after reviewing the Underlying Lawsuit for potential coverage. (*Id.*) On February 11, 2008, the Insurers denied coverage for the reasons previously stated in the July 21, 2004 declination letter. (Chong Decl., Ex. M.)

After receiving the second declination letter, Seattle Collision and the Sullivans wrote to the

Insurers in greater depth about their legal position regarding coverage. (Chong Decl., Ex. N.) Seattle Collision and the Sullivans explained their belief that the Insurers had wrongfully denied coverage and advised the Insurers that, absent reconsideration of the denial, Seattle Collision and the Sullivans would bring suit against the Insurers. (*Id.*) The Insurers confirmed their denial. (Chong Decl., Ex. O.)

On November 17, 2008, Plaintiff Oregon Mutual Insurance Company ("Oregon Mutual"), another insurer of Seattle Collision, brought suit in this court against Seattle Collision and the Sullivans for a declaratory judgment that it was not obligated to defend or indemnify Seattle Collision and the Sullivans in the Underlying Lawsuit.[3] (Compl. (Dkt. # 1) ¶¶ 6.1-6.12.) Seattle Collision and the Sullivans answered the complaint and filed a third-party complaint against the Insurers. (*See* Third-Pty Compl. (Dkt. # 10).) They subsequently filed an amended answer and third-party complaint. (*See* 2d Third- Pty. Compl. (Dkt. # 25).) In their amended third-party complaint, Seattle Collision and the Sullivans allege causes of actions against the Insurers for "breach of contract, negligence, breach of the obligation of good faith and fair dealing, consumer protection act violations, insurance fair conduct act violations, declaratory relief and monetary damages." (2d Third-Pty. Compl. § X.)

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[3]Oregon Mutual, Seattle Collision, and the Sullivans have stipulated to the dismissal of all of the claims between them. (*See* Dkt. ## 65-66.)

On April 16, 2009, the Insurers filed the instant motion for summary judgment (Dkt. # 33). The Insurers request that the court confirm that the insurance policies do not provide coverage for the claims alleged by Underlying Plaintiffs, that the Insurer's denial of coverage was proper, and that Seattle Collision and the Sullivans's various bad faith claims do not withstand summary judgment because the Insurers acted reasonably.

## II. ANALYSIS

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is appropriate if the evidence, when viewed in the light most favorable to the non-moving party, demonstrates that there is no genuine issue of material fact. Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. County of Los Angeles*, 477 F.3d 652, 658 (9th Cir. 2007). "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing there is no material factual dispute and that he or she is entitled to prevail as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets this burden, the nonmoving party must present affirmative evidence to demonstrate specific facts showing that there is a genuine issue for trial. *Galen*, 477 F.3d at 657.

## A. Interpretation and Construction of Insurance Policies

In Washington, insurance policies are construed as contracts. *Quadrant Corp. v. Am. States Ins. Co.*, 110 P.3d 733, 737 (Wash. 2005). Determining whether coverage exists is a two-step process: "The insured must show the loss falls within the scope of the policy's insured losses. To avoid coverage, the insurer must then show the loss is excluded by specific policy language." *McDonald v. State Farm Fire & Cas. Co.*, 837 P.2d 1000, 1003-04 (Wash. 1992). Courts must consider the policy as a whole and give it a "'fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.'" *Quadrant*, 110 P.3d at 737 (quoting *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 15 P.3d 115, 122 (Wash. 2000)). If the language of an insurance policy is clear and unambiguous, courts must enforce it as written; courts may not modify it or create ambiguity where none exists. *Quadrant*, 110 P.3d at 737.

A clause in an insurance policy will be deemed ambiguous only "when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable." *Am. Nat. Fire Ins. Co. v. B & L Trucking & Const. Co., Inc.*, 951 P.2d 250, 256 (Wash. 1998). Courts look to extrinsic evidence regarding the intent of the parties to resolve ambiguity. *Quadrant*, 110 P.3d at 737. "Any ambiguity remaining after examination of the applicable extrinsic evidence is resolved against the insurer and in favor of the

insured." *Id.* The expectations of the insured cannot override the plain language of the insurance policy. *Id.*

Policy coverage exclusions run contrary to the fundamental purpose of insurance and courts will not extend them beyond their clear and unequivocal language. *City of Bremerton v. Harbor Ins. Co.*, 963 P.2d 194, 196 (Wash. Ct. App. 1998). Exclusions are strictly construed against the insurer. *Quadrant*, 110 P.3d at 737; *Bremerton*, 963 P.2d at 196. Nevertheless, "a strict application should not trump the plain, clear language of an exclusion such that a strained or forced construction results." *Quadrant*, 110 P.3d at 737.

B. Does the Loss Fall Within the Scope of the Policies' Insured Losses?

For present purposes, the Insurers do not dispute that that the claims alleged by Underlying Plaintiffs fall within the general scope of the policies' insured losses. (Mot. at 14.) Instead, the Insurers challenge the second step of the two-step process for determining coverage, *i.e.*, does specific policy language exclude the loss? (*Id.*) Here, the court assumes, without deciding, that the loss at issue in the Underlying Lawsuit falls within the scope of the policies.

C. Does Specific Policy Language Exclude the Loss?

The Insurers argue that the language of the insurance policies specifically excludes coverage for losses caused by pollution, and thus that they properly

denied coverage. (Mot. at 2.) In support of this argument, the Insurers point to pollution exclusion clauses contained in all seven of the insurance policies. These exclusions fall into two distinct categories. On the one hand, Safeco Policy BA84843444[4] and American States Policies 01-CE-902048-1, 01-CE902048-2, and 01-CE-902048-3 include so-called absolute pollution exclusion clauses. On the other hand, American States Policies 01-CE-902048-4 and 01-CG-501146-1 include modified absolute pollution exclusion clauses. The Insurers contend that all of the exclusions, regardless of language, function to exclude coverage because Underlying Plaintiffs allege claims arising out of traditional environmental harm.

1. Pollutants

The insurance policies define the term "pollutants" to mean "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste."[5] (*See, e.g.,* Third Declaration of Thomas J. Braun ("3d Braun Decl.") (Dkt. # 59), Ex. A at 24, § VI.K.) Underlying Plaintiffs allege that Seattle Collision and the Sullivans are liable for remedial costs associated with the release of "hazardous substances," including volatile organic compounds,

---

[4]The insurance coverage for March 27, 1999, to March 27, 2000, is a renewal of Safeco Policy BA8484344. (*See* Reply at 3.)

[5]American States Policies 01-CE-902048-1 and 01-CG-501146-1 refer to "acids" rather than "acid."

specifically perc and its degradation compounds. (*See* Underlying Compl. ¶¶ 28, 33.) Seattle Collision and the Sullivans do not dispute that perc constitutes a pollutant under the policies. Indeed, they submit the chemical fact sheet for perc prepared by the Office of Pollution Prevention and Toxics for the United States Environmental Protection Agency, which describes the range of deleterious health effects caused by exposure to perc. (*See* Bollero Decl., Ex. B.) The court finds that perc is a pollutant under the policies.

2. Absolute Pollution Exclusion Clauses: Safeco Policy BA8484344 and American States Policies 01-CE-902048-1, 01-CE902048-2, and 01-CE902048-3

Pollution exclusion clauses "originated from insurers' efforts to avoid sweeping liability for long-term release of hazardous waste." *Quadrant*, 110 P.3d at 737. Since the promulgation of the standard absolute pollution exclusion in the mid-1980s, Washington courts have addressed the applicability of the exclusion both in the context of traditional environmental harms and with respect to "incidents that did not involve so-called classic environmental pollution." *Id.* at 737-741; *see Kent Farms, Inc. v. Zurich Ins. Co.*, 998 P.2d 292, 295 (Wash. 2000); *Cook v. Evanson*, 920 P.2d 1223, 1226 (Wash. Ct. App. 1996). The law in Washington is well-settled that, at a minimum, the absolute pollution exclusion bars coverage when the underlying claim arises from a pollutant acting "as a pollutant." *Kent Farms*, 998 P.2d at 295; *see Quadrant*, 110 P.3d at 742.

Safeco Policy BA8484344 and American States Policies 01-CE-902048-1, 01-CE902048-2, and 01-CE-902048-3 include absolute pollution exclusion clauses. The exclusions contained in these policies provide:

> B. Exclusions
>
> This insurance does not apply to any of the following:
>
> . . .
>
> 8. Pollution Exclusion Applicable to "Garage Operations" – Other Than Covered "Autos"
>
> "Bodily injury", "property damage" or loss, cost or expense arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":
>
> a. At or from any premises, site or location that is or was at any time owned or occupied by, or rented or loaned to, any "insured[.]"
>
> . . .
>
> Loss, cost or expense means those resulting from any:
>
> (1) Request, demand or order that the

> "insured" or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants";
>
> (2) Claim or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to or assessing the effects of "pollutants".

(*E.g.*, 3d Braun Decl., Ex. A at 14, § II.B.)

The language of the absolute pollution exclusion clauses clearly and unambiguously precludes coverage. Underlying Plaintiffs raise claims under the MTCA and seek payment from Seattle Collision and the Sullivans for past and future remedial action costs arising from the alleged release of perc. These claims fall squarely within the scope of the exclusion. Underlying Plaintiffs allege property damage or other loss, cost, or expense arising out of the actual or alleged "discharge, dispersal, seepage, migration, release or escape of" perc or other hazardous materials. Underlying Plaintiffs seek to recover for traditional environmental harms arising from a pollutant acting as a pollutant. Although courts must strictly construe exclusions against the insurer, the Washington Supreme Court also teaches that courts must not limit the scope of the exclusion where its language is subject to only one reasonable

interpretation. *Quadrant*, 110 P.3d at 743. Here, the absolute pollution exclusions give rise to only one reasonable conclusion: the absolute pollution exclusions bar coverage on these facts. *See Kent Farms*, 998 P.2d at 296 ("[T]he pollution exclusion clause was designed to exclude coverage for traditional environmental harms."). Seattle Collision and the Sullivans do not argue otherwise. Therefore, the court concludes that the Insurers have met their burden in establishing that the absolute pollution exclusion clauses contained in Safeco Policy BA8484344 and American States Policies 01-CE-902048-1, 01-CE902048-2, and 01-CE-902048-3 exclude liability for the losses alleged by Underlying Plaintiffs.

3. Modified Absolute Pollution Exclusion Clauses: American States Policies 01-CE-902048-4 and 01-CG-501146-1

The final two policies, American States Policies 01-CE-902048-4 and 01-CG-501146-1[6], include a modified version of the absolute pollution exclusion.[7]

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[6]The language of the modified absolute pollution exclusion clauses in American States Policies 01-CE-902048-4 and 01-CG-501146-1 is not identical, although it is materially similar. For purposes of this order, the court will refer to the language of American States Policy 01- CG-501146-1. To the extent the policies differ, the court determines that the differences do not affect the court's analysis.

[7]Only a small number of courts—and no courts applying Washington law—have interpreted language similar to that of the modified absolute pollution exclusion clauses. *See Hussey Copper,*

The modified absolute pollution exclusion divides the exclusion into two paragraphs—paragraph f.(1), which covers bodily injury or property damage, and paragraph f.(2), which covers loss, cost or expense—and adds an exception to the second paragraph. Seattle Collision and the Sullivans argue that the exception applies to both paragraphs and thereby restores coverage with respect to non-remediation claims. (Resp. at 14-21.) The Insurers reply that the exception applies only to paragraph f.(2) and that paragraph f.(1) operates independently to exclude coverage for all claims. (Reply at 3-9.) The modified absolute pollution exclusion provides as follows:

> 2. Exclusions
>
> This insurance does not apply to:
>
> . . .
>
> f. Pollution
>
> (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage,

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*Ltd. v. Royal Ins. Co. of Am.*, 567 F. Supp. 2d 774 (W.D. Pa. 2008); *Mid-Continent Cas. Co. v. Third Coast Packaging Co., Inc.*, 342 F. Supp. 2d 626 (S.D. Tx. 2004); *Whittier Props., Inc. v. Alaska Nat'l Ins. Co.*, 185 P.3d 84 (Alaska 2008); *Clean Harbors Envtl. Serv., Inc. v. Boston Basement Techs., Inc.*, No. 1075, 2008 WL 534536 (Mass. App. Ct. Feb. 26, 2008). The parties analyze these cases in depth. As discussed below, however, the court determines that resolution of the instant motion does not require the court to address this case law.

migration, release or escape of "pollutants":

> (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured.
>
> . . .

(2) Any loss, cost or expense arising out of any:

> (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
>
> (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of

> "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority. (*E.g.*, 3d Braun Decl., Ex. G at 28-29, § I.2.f.)

Here, the parties agree that the policies do not provide coverage for the remediation claims alleged by Underlying Plaintiffs. Notably, Seattle Collision and the Sullivans's argument that the exception to paragraph f.(2) restores coverage necessarily concedes that the modified absolute pollution exclusion clauses bar coverage for remediation claims. (*See* Resp. at 17.) Additionally, Seattle Collision and the Sullivans do not argue that the policies offer coverage for remediation claims. The court finds that the modified absolute pollution exclusion clauses of American States Policies 01-CE-902048-4 and 01-CG-501146-1 clearly and unambiguously exclude coverage for the remediation claims alleged by Underlying Plaintiffs.

Having conceded that the policies do not cover remediation costs, Seattle Collision and the Sullivans argue instead that Underlying Plaintiffs allege nonremediation claims that fall within the scope of the insurance policies and thereby trigger the duty to defend. A complaint must be construed liberally to determine whether it alleges facts that, if proven, could impose liability on the insured within the scope of the insurance policy. *See Truck Ins. Exch. v. Vanport Homes, Inc.*, 58 P.3d 276, 281-82 (Wash. 2002). Seattle

Collision and the Sullivans read the Underlying Complaint to include not only claims for past and future remedial action costs but also a claim for natural resource damages.[8] (Resp. at 16-21.) Seattle Collision and the Sullivans characterize this hypothetical claim as a type of "property damage" claim within the meaning of the policies. (Resp. at 17, 21.) The court is not persuaded that the Underlying Complaint, even construed liberally, alleges a claim for natural resource damages or other, non-remediation claims. Nevertheless, the court need not resolve this issue because, even accepting Seattle Collision and the Sullivans's characterization of the Underlying Complaint, the modified absolute pollution exclusion clauses exclude coverage for any such non-remediation claims.

In determining whether the policies provide coverage for these non-remediation claims, the court first addresses the relationship between paragraph f.(1) and the exception to paragraph f.(2). Seattle Collision and the Sullivans argue that the exclusion applies to both paragraphs of the modified absolute pollution exclusion clauses. (Resp. at 15.) The court disagrees. Although the exception's reference to "this paragraph" appears ambiguous when read in isolation, the plain language of

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[8]Seattle Collision and the Sullivans further suggest that Underlying Plaintiffs could have brought claims for negligent or intentional trespass. (Resp. at 17.) Having reviewed the Underlying Complaint, the court finds that it plainly does not allege trespass claims. The court declines to consider whether American States Policies 01-CE-902048-4 and 01-CG-501146-1 provide coverage for liability based on trespass claims.

the policies as a whole clarifies that the exception refers specifically to paragraph f.(2). For example, in the exclusion portion of American States Policy 01-CG-501146-1, the policy refers to headings denoted by letters (a., b., c., etc.) as "exclusions," sub-headings denoted by numbers ((1), (2), (3), etc.) as "paragraphs," and further sub-headings denoted by letters ((a), (b), (c), etc.) as "subparagraphs." (*See, e.g.*, 3d Braun Decl., Ex. G at 30, § I.2.j.) Second, the language of the exception tracks the language of paragraph f.(2), not of paragraph f.(1). Interpreting the policies as a whole and finding the language clear and unambiguous, the court concludes that the exception applies only to paragraph f.(2). *Cf. Whittier*, 185 P.3d at 94. As a consequence, regardless whether the exception to paragraph f.(2) restores coverage, "the coverage remains 'subject to the limitation of each and every exclusion.'" *Id.* (quoting *Stillwater Condo Ass'n v. Am. Home Assurance Co.*, 508 F. Supp. 1075, 1079 (D. Mont. 1981)); *see Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788, 795 (N.J. 1979). In other words, paragraph f.(1), to the extent it excludes coverage, functions independently of paragraph f.(2).

In light of this construction, the first paragraph of the modified absolute pollution exclusion clauses clearly and unambiguously excludes coverage for all non-remediation, property damage claims. Specifically, paragraph f.(1) excludes coverage for property damage arising out of the actual or alleged release of pollutants. "Property damage" is a defined term under the insurance policies, and the parties agree that a claim for natural resource damages, whether or not actually asserted in the Underlying Complaint,

constitutes a claim for "property damage" as characterized by Seattle Collision and the Sullivans. (Resp. at 17, 21; Reply at 11.) Indeed, this is a necessary part of Seattle Collision and the Sullivans's argument that non-remediation "property damage" claims fall within the exception to paragraph f.(2), which only applies to "liability for damages because of '*property damage*' that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement." (3d Braun Decl., Ex. G at 28-29, § I.2.f.) Seattle Collision and the Sullivans do not address the question whether coverage exists under paragraph f.(1) for these property damage claims, relying instead on the contention that the exception to paragraph f.(2) applies to both paragraphs. Having rejected Seattle Collision and the Sullivans's argument that the exception applies to both paragraphs, however, any property damage claim caused by the alleged or actual release of perc, such as the alleged natural resource damages claim, constitutes the type of traditional environmental harms excluded by the pollution exclusions, as discussed in Part II.C.2. *See Quadrant*, 110 P.3d at 742; *Kent Farms*, 998 P.2d at 296. The court concludes that the modified absolute pollution exclusion clauses contained in American States Policies 01-CE-902048-4 and 01-CG-501146-1 exclude coverage for non-remediation property damage claims.

D. Bad Faith Claims

The Insurers also request that the court grant summary judgment in their favor as to all causes of

action predicated on the Insurers' alleged bad faith denial of coverage and wrongful claims handling. (Mot. at 17-19.) Seattle Collision and the Sullivans allege claims for (1) breach of the duty to defend and the duty to indemnify, (2) breach of the obligation of good faith and fair dealing under RCW 48.01.010 and the Washington Administrative Code, (3) violation of Washington's Consumer Protection Act ("CPA"), RCW 19.86 *et seq.*; (4) violation of Washington's Insurance Fair Conduct Act ("IFCA"), RCW 48.30.015; (5) negligence and wrongful conduct; (6) estoppel to deny coverage; (7) declaratory relief; and (8) damages. (Am. Third-Party Compl. ¶¶ 14.1-19.1.) All of these claims stem from Ms. Chong's investigation and the Insurers' subsequent denial of coverage. The Insurers challenge these claims as a group, asserting that the claims fail because reasonable minds could not disagree that the Insurers denied coverage based on reasonable grounds. (Mot. at 17-19.)

1. Breach of the Duty to Defend and the Duty to Indemnify

"The duty to defend arises at the time an action is first brought, and is based on the potential for liability." *Truck Ins. Exch.*, 58 P.3d at 281; *see Woo v. Fireman's Fund Ins. Co.*, 164 P.3d 454, 459 (Wash. 2007). This duty is triggered "'when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage.'" *Truck Ins. Exch.*, 58 P.3d at 281-82 (quoting *Unigard Ins. Co. v. Leven*, 983 P.2d 1155, 1160 (Wash. Ct. App. 1999)).

Nonetheless, if the insurance policy clearly does not cover the alleged claim then the insurer is relieved of its duty to defend. *Truck Ins. Exch.*, 58 P.3d at 282. "Once the duty to defend is triggered by a claim that potentially falls within the policy's basic coverage provisions, the insurer is relieved of that duty only if the claim is clearly excluded by an applicable exclusionary clause within the policy." *Am. Best Food, Inc. v. Alea London, Ltd.*, 158 P.3d 119, 124 (Wash. Ct. App. 2007).

Here, for the reasons discussed above, the pollution exclusion clauses clearly exclude coverage for liability on the claims asserted by Underlying Plaintiffs. Even construed liberally, the Underlying Complaint would not impose liability on Seattle Collision and the Sullivans within the scope of the policies' coverage. As a result, the Insurers were relieved of their duty to defend. *Truck Ins. Exch.*, 58 P.3d at 282. Likewise, the Insurers owed no duty to indemnify. *Woo*, 164 P.3d at 459 ("[T]he duty to indemnify exists only if the policy actually covers the insured's liability."). Therefore, the court grants summary judgment in favor of the Insurers on Seattle Collision and the Sullivans's claim for breach of the duty to defend and the duty to indemnify.

2. Bad Faith Claims

An insurer owes a duty to act in good faith towards its insured. RCW 48.01.030; *Smith v. Safeco Ins. Co.*, 78 P.3d 1274, 1276 (Wash. 2003). Breach of the duty of good faith may give rise to a tort action for

bad faith. *Smith*, 78 P.3d at 1276. To prevail on a bad faith claim, the insured must show that the insurer's breach of the insurance contract was unreasonable, frivolous, or unfounded. *Id.* at 1277. In addition, as with any other tort claims, "the insured must prove duty, breach of duty, and damages proximately caused by any breach of duty." *Werlinger v. Clarendon Nat'l Ins. Co.*, 120 P.3d 593, 595 (Wash. Ct. App. 2005). Whether an insurer acted in bad faith is a question of fact. *Smith*, 78 P.3d at 1277. On a motion for summary judgment, courts review bad faith claims under the following standard:

> If the insured claims that the insurer denied coverage unreasonably in bad faith, then the insured must come forward with evidence that the insurer acted unreasonably. The policyholder has the burden of proof. The insurer is entitled to summary judgment if reasonable minds could not differ that its denial of coverage was based upon reasonable grounds. If, however, reasonable minds could differ that the insurer's conduct was reasonable, or if there are material issues of fact with respect to the reasonableness of the insurer's action, then summary judgment is not appropriate. If the insurer can point to a reasonable basis for its action, this reasonable basis is significant evidence that it did not act in bad faith and may even establish that reasonable

> minds could not differ that its denial of coverage was justified.

*Id.* at 1277-78 (citations omitted).

*I. Bad Faith Denial of Coverage*

Viewing the evidence in the light most favorable to Seattle Collision and the Sullivans, the court concludes that reasonable minds could not differ that the Insurers denied coverage based on reasonable grounds. Specifically, the Insurers denied coverage based on a correct interpretation of the pollution exclusion clauses. (*See* Chong Decl., Exs. J, M.) This all but precludes a finding of bad faith. *Am. Best Food*, 158 P.3d at 128 ("[B]ad faith will not be found where the failure to provide a defense is based upon a reasonable interpretation of the insurance policy."); *Kirk v. Mt. Airy Ins. Co.*, 951 P.2d 1124, 1126 (Wash. 1998). Seattle Collision and the Sullivans rest their arguments to the contrary on the incorrect assertion that the insurance policies provide coverage for liability on the claims alleged by Underlying Plaintiffs. The court grants summary judgment on Seattle Collision and the Sullivans's bad faith claim for denial of coverage.

*ii. Bad Faith Investigation*

Viewing the evidence in the light most favorable to Seattle Collision and the Sullivans, the court concludes that reasonable minds could not differ that the Insurers conducted a reasonable investigation. After receiving the original notice, the Insurers arrived

at the legal opinion that the pollution exclusion clauses clearly excluded coverage for Underlying Plaintiffs' claims. (*See* Chong Decl., Exs. J, M.) Accordingly, to survive summary judgment, Seattle Collision and the Sullivans must show that, despite this legal conclusion, further investigation of factual materials would have led to a different understanding or result. *See Am. Best Food*, 158 P.3d at 129.

Seattle Collision and the Sullivans first argue that the Insurers failed to conduct a reasonable investigation because they did not consider the fact that Seattle Collision did not use perc in its operations. (Resp. at 5.) The evidence, viewed in the light most favorable to Seattle Collision and the Sullivans, demonstrates that Mr. Sullivan informed Ms. Chong of this alleged fact during their conversation of July 7, 2004 (Chong Decl., Ex. I), but Ms. Chong did not follow-up to determine the accuracy of Mr. Sullivan's statement or its potential effects on the Underlying Lawsuit (Bollero Decl. ¶ 5). Even assuming Ms. Chong failed to pursue these inquiries, however, Seattle Collision and the Sullivans have not shown that further investigation would have led to a different understanding or result with respect to coverage. The pollution exclusion clauses apply regardless whether Seattle Collision used or did not use perc. Although this fact may be relevant to the defense of the Underlying Lawsuit, it does not weigh on the reasonableness of the Insurers' investigation before denying coverage. Likewise, the Insurers' subsequent decision not to pursue this issue when raised again by Seattle Collision and the Sullivans in 2007, as well as

their decision not to follow-up on the alleged innocent owner's defense, does not affect the propriety of the denial. The court finds that Seattle Collision and the Sullivans have not shown that the Insurers failed to conduct a reasonable investigation on this ground.

Seattle Collision and the Sullivans next argue that the Insurers failed to conduct a reasonable investigation because they did not consider or analyze the exception to paragraph f.(2). (Resp. at 21-22.) The evidence demonstrates that Ms. Chong, in her July 21, 2004 declination letter, quoted both versions of the pollution exclusion clauses, including the exception, and stated that the Insurers were of the opinion that "the above-referenced pollution exclusions apply to this claim and therefore there is no coverage for this claim under any policy. . . ." (Chong Decl., Ex. J.) Ms. Chong does not discuss the exclusions or the exception in depth. Even assuming the Insurers did not consider the exception, however, Seattle Collision and the Sullivans have again not demonstrated that further investigation would have yielded a different understanding or result. Although Seattle Collision and the Sullivans contend the exception operates to restore coverage, the court has rejected this argument. The court finds that Seattle Collision and the Sullivans have not shown that the Insurers failed to conduct a reasonable investigation on this ground.

In sum, viewing the evidence in the light most favorable to Seattle Collision and the Sullivans, the court grants summary judgment on the bad faith claims alleging failure to conduct a reasonable

investigation.

*iii. Bad Faith Delay*

"Under Washington law every insurer has a duty to act promptly, in both communication and investigation, in response to a claim or tender of defense." *St. Paul Fire and Marine Ins. Co. v. Onvia, Inc.*, 196 P.3d 664, 668 (Wash. 2008) (citing WAC 284-30-330(2)-(4), WAC 284-30-360(1) & (3), and WAC 284-30-370). "As with other bases for a claim of bad faith, however, delay does not constitute bad faith unless it is due to a frivolous and unfounded reason." *Rizzuti v. Basin Travel Serv. of Othello, Inc.*, 105 P.3d 1012, 1021 (Wash. Ct. App. 2005). Seattle Collision and the Sullivans argue that the Insurers breached their duty to act promptly when they failed to complete their investigation within the 30-day period specified by WAC 284-30-370. (Resp. at 7 n.4.) Specifically, the evidence indicates that over 30 days elapsed between Seattle Collision and the Sullivans's tender on December 8, 2007, and the Insurers' denial of coverage on February 11, 2008. (*See* Chong Decl., Exs. K-M.) The Insurers do not respond to this argument or brief this issue for consideration by the court, and neither party suggests a reason for the delay. Therefore, on this record, the court denies summary judgment with respect to Seattle Collision and the Sullivans's bad faith claims predicated on delay in responding to the December 8, 2007 tender.

3. CPA Claims

The CPA provides that "unfair or deceptive acts

or practices in the conduct of any trade or commerce" are unlawful. RCW 19.86.020. An insured may invoke the CPA against an insurer that violates RCW Title 48 or the administrative regulatory provisions set forth at WAC 284-30-300 through 284-30-410. *See Industrial Indem. Co. of the Nw., Inc. v. Kallevig*, 792 P.2d 520, 529 (Wash. 1990); *see* Thomas V. Harris, *Washington Insurance Law* § 8.3 (2d ed. 2006). In the insurance context, a CPA claim requires (1) an unfair or deceptive practice, (2) in trade or commerce, (3) that affects the public interest, (4) which causes injury to the party in his or her business or property, and (5) which injury is causally linked to the unfair or deceptive act. *Anderson v. State Farm Mut. Ins. Co.*, 2 P.3d 1029, 1033 (Wash. Ct. App. 2000).

Seattle Collision and the Sullivans do not explain the nature of their CPA claims with specificity. In their response, Seattle Collision and the Sullivans briefly address these claims in a footnote (Resp. at 7 n.4); they subsequently filed a notice of supplemental authority to augment their CPA arguments (Dkt. # 54). Seattle Collision and the Sullivans now contend the Insurers violated WAC 284-30-330(2) and (4), WAC 284-30-370, and WAC 284-30-930(2).

*I. Failure to Conduct a Reasonable Investigation*

Under WAC 284-30-330(4), a CPA claim may be made out where the insurer refuses to pay claims without conducting a reasonable investigation. As discussed above, Seattle Collision and the Sullivans

have not submitted evidence sufficient to establish that the Insurers' investigation was unreasonable or that the denial of coverage was made without reasonable justification. Therefore, the court grants summary judgment with respect to Seattle Collision and the Sullivans's CPA claim for failure to conduct a reasonable investigation under WAC 284-30-330(4).

*ii. Failure to Begin Investigation Within 15 Days*

Under WAC 284-30-930(2), an insurer's failure to commence investigation of an environmental claim within 15 working days after receipt of a notice of an environmental claim may give rise to a CPA claim. Although Seattle Collision and the Sullivans assert WAC 284-30-930(2) as a basis for their CPA claim, they provide no supporting factual or legal analysis. The evidence demonstrates that the Insurers commenced investigation within 15 days after receipt of both the 2004 notice and the 2007 tender of the Underlying Complaint. Therefore, on this record, the court grants summary judgment on Seattle Collision and the Sullivans's CPA claims under WAC 284-30-930(2).

*iii. Failure to Complete Investigation Within 30 Days*

Under WAC 284-30-370, an insurer shall complete investigation of a claim within 30 days after notification, unless such investigation cannot reasonably be completed within such time. *See also* WAC 284-30-330(2) ("Failing to acknowledge and act

reasonably promptly upon communications with respect to claims arising under insurance policies."). As discussed above, the Insurers did not complete the investigation of the December 8, 2007 tender within 30 days. Neither the Insurers nor Seattle Collision and the Sullivans brief these issues for consideration by the court. Therefore, the court denies summary judgment on Seattle Collision and the Sullivans's CPA claims under WAC 284-30-330(2) and 284-30-370.

4. IFCA Claim

The IFCA provides a cause of action against insurers for unreasonably denying coverage. RCW 48.30.015; *Malbco Holdings, LLC v. AMCO Ins. Co.*, 546 F. Supp. 2d 1130, 1132 (E.D. Wash. 2008). Seattle Collision and the Sullivans do not address the IFCA in their briefing. As discussed above, viewing the evidence in the light most favorable to Seattle Collision and the Sullivans, reasonable minds could not differ that the Insurers reasonably denied coverage. Therefore, the court grants summary judgment in favor of the Insurers on Seattle Collision and the Sullivans's IFCA claim.

5. Negligence Claim

Negligence and bad faith constitute separate and distinct causes of action under Washington law. *First State Ins. Co. v. Kemper Nat'l Ins. Co.*, 971 P.2d 953, 959 (Wash. Ct. App. 1999). An insurer owes a duty to exercise reasonable care with respect to the interests of its insured. Harris, *supra*, at § 7.2. "Even if an insurer acts in good faith, it will be held liable to

its insured for any proximal negligence." *Id.* To establish a claim for negligence, the insured must show that the insurer was at "fault" under RCW 4.22.015. Neither the Insurers nor Seattle Collision and the Sullivans specifically address the negligence claim in their briefing. Viewing the evidence in the light most favorable to Seattle Collision and the Sullivans, a reasonable trier of fact could conclude that the Insurers acted negligently by not completing their investigation of the December 8, 2007 tender within 30 days as discussed above. Therefore, the court denies summary judgment on Seattle Collision and the Sullivans's negligence claim.

6. Estoppel to Deny Coverage, Declaratory Relief, and Damages Claims

The Insurers also request summary judgment in their favor with respect to Seattle Collision and the Sullivans's claims for estoppel to deny coverage, declaratory relief, and damages. (Mot. at 17.) Neither the Insurers nor Seattle Collision and the Sullivans ORDER - 28 brief these issues for consideration by the court. Therefore, the court denies summary judgment with respect to these claims.

D. Motion to Strike

The Insurers move to strike (Dkt. # 61) arguments raised for the first time by Seattle Collision and the Sullivans in their surreply (Dkt. # 60) to this court's minute order (Dkt. # 58) directing the Insurers to file complete copies of the insurance policies. The

court agrees with the Insurers that Seattle Collision and the Sullivans present new arguments in their surreply. Specifically, Seattle Collision and the Sullivans contend that coverage exists under the "Covered Autos" provisions of the insurance policies. (Surreply (Dkt. # 60) at 3-5.) The court grants the motion to strike and declines to consider these arguments because Seattle Collision and the Sullivans raised them for the first time in their surreply despite a full opportunity to brief the issues. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("arguments not raised by a party in its opening brief are deemed waived"); *United States ex rel. Giles v. Sardie*, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000) ("It is improper for a moving party to introduce new facts or different legal arguments in the reply brief than those presented in the moving papers.").

## III. CONCLUSION

For the foregoing reasons, the court GRANTS in part and DENIES in part the Insurers' motion for summary judgment (Dkt. # 33).

Dated this 28th day of October, 2009.

/s/
JAMES L. ROBART
United States District Judge

APPENDIX D

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON IN AND FOR THE
COUNTY OF KING

[DATE STAMP]
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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

ENODIS CORP., a Delaware Corporation; and BELSHAW BROS., INC., a Delaware Corporation,

Plaintiffs,

v.

No. 07-2033766-1 KNT

SEATTLE COLLISION CENTER, INC., a Washington Corporation; PENTHOUSE DRAPERY CLEANERS & MANUFACTURERS, INC., a Washington Corporation; TODD M. and KAREN SULLIVAN, individually and on behalf of their marital community; and COLIN T. and BARBARA TSUCHIKAWA, individually and on behalf of their marital community,

Defendants.

# COMPLAINT FOR MTCA CONTRIBUTION AND DECLARATORY JUDGMENT

Plaintiff Enodis Corp. ("Enodis") by and through its attorneys Davis Wright Tremaine LLP and Plaintiff Belshaw Bros., Inc. ("Belshaw") by and through its attorneys Houlihan Law (collectively the "Plaintiffs") allege as follows:

## I. PARTIES

1. Plaintiff Enodis is a Delaware corporation doing business in the State of Washington, with its principal place of business in New Port Richey, Florida.

2. Plaintiff Belshaw is a Delaware corporation doing business in the State of Washington, with its principal place of business in Auburn, Washington.

3. Defendant Seattle Collision Center Inc. ("SCC") is a Washington corporation doing business in the State of Washington, with its principal place of business located at 1752 Rainier Avenue South, Seattle, Washington. ("SCC Property").

4. Defendant Penthouse Drapery Cleaners & Manufacturers, Inc. ("Penthouse Drapery") is a Washington corporation with its principal place of business located at 4033 16th Avenue S.W., Seattle, Washington.

5. Defendants Todd M. and Karen Sullivan. (the "Sullivans"), husband and wife, reside in King County and are the current owners and/or operators of Seattle Collision and the SCC Property

6. Defendants Colin T. and Barbara Tsuchikawa (the "Tsuchikawas"), husband and wife, reside in King County and are the current owners and/or operators of Penthouse Drapery. The Tsuchikawas leased the SCC Property from approximately 1984 to 1986 and then owned the SCC Property from approximately 1986 to 1990. The Tsuchikawas operated Penthouse Drapery on the SCC Property from approximately 1984 to 1990.

## II. JURISDICTION AND VENUE

7. This Court possess jurisdiction over the subject matter of this case pursuant to Washington's Model Toxics Control Act.("MTCA"), RCW 70.105D *et seq.*, and the Washington Declaratory Judgment Act: RCW 7.24.010 *et seq.*

8. The Court possesses personal jurisdiction over Defendants in this case.

9. Venue is proper in King County, Washington, under RCW 4.12.010 because the properties that are the subject of this action are located in King County, Washington.

## III. STATEMENT OF FACTS

10. Belshaw is the former owner and current lessee of the property located at 1750 22nd Avenue South, Seattle, Washington (the "Belshaw Property") and the parking lot that lies to the south of the Belshaw Property) across Grand Street. (The Belshaw Property and the parking lot shall be referred to collectively as the "Site.")

11. Enodis is the former owner of the stock of Belshaw.

12. The SCC Property is located immediately adjacent to and north of the Site.

13. Upon information and belief, Penthouse Drapery and the Tsuchikawas operated a dry cleaning facility on the SCC Property from approximately 1984 to 1990.

14. Penthouse Drapery and the Tsuchikawas are believed to have released, stored, utilized, generated, and disposed of hazardous substances, including volatile organic compounds ("VOCs"), during their ownership, lease, and/or operation of the sec Property.

15. Upon information and belief, SCC and the Sullivans have operated a collision repair facility on the SCC Property since 1994. SCC and the Sullivans are believed to be storing, utilizing, generating, and disposing of hazardous substances, including VOCs, during their ownership, lease, and/or operation of the SCC Property.

16. Beginning in April 2002, Enodis engaged environmental consultants to conduct an investigation of soil and groundwater on the Site. The investigation identified the presence of VOCs on the Site. In particular, the investigation identified the presence of perchlorethylene ("PERC") and its degradation compounds in soils and groundwater on the Site. PERC is commonly used in dry cleaning and auto repair operations.

17. Subsequent investigations conducted. from 2002 through 2005 revealed that VOCs are migrating onto the Site from the SCC Property. Sampling has confirmed that the VOC contamination extends from the SCC Property, across the Belshaw Property, across Grand street, and onto the adjacent parking lot. No on-Site source of PERC contamination has ever been identified.

18. In June 2004, Enodis notified SCC, the Sullivans, the Tsuchikawas, and Penthouse Drapery of the discovery of VOCs migrating onto the Site, of their potential liability therefor, and demanded that they investigate and remediate the contamination and reimburse Plaintiffs for the remediation costs they incurred.

19. On April 1, 2005, Enodis again sent notification letters to SCC, the Sullivans, the Tsuchikawas, and Penthouse Drapery. The letters provided notice that Enodis was continuing to investigate and assess the contribution ofVOCs migrating from the SCC Property. Enodis again

notified these parties of their potential liability and demanded that these parties investigate and remediate the contamination and reimburse Plaintiffs for their remediation costs. SCC, the Sullivans, the Tsuchikawas, and Penthouse Drapery have never responded.

## IV. FIRST CLAIM FOR RELIEF
## MTCA PRIVATE RIGHT OF ACTION

20. Paragraphs 1 through 19 are hereby incorporated by ibis reference.

21. Defendants are persons as defined in RCW 70.105D.020(14).

22. The SCC Property constitutes a "facility" as defined in RCW 90.105D.020(4).

23. A release of hazardous substances requiring remedial action under MTCA, Chap. 70.105D RCW, and the MTCA Cleanup Regulations, WAC Ch. 173-340, has occurred at the Site.

24. SCC and the Sullivans are "potentially liable persons" as the current owners and/or operators of the SCC Property. RCW 70.105D.040(1)(a); RCW 70.105D.020(16).

25. Penthouse Drapery and the Tsuchikawas are "potentially liable persons" as prior owners and/or operators of the SCC Property at the time of disposal or release of hazardous substances on and from that

facility. RCW 70.105D.040(1)(b); RCW 70.105D.020(16).

26. Penthouse Drapery, the Tsuchikawas, SCC, and the Sullivans are also "potentially liable persons" because they stored and utilized hazardous substances, including VOCs, and arranged for the disposal of these hazardous substances at or from the SCC Property. RCW 70.105D.040(1)(c).

27. Plaintiffs have incurred and will continue to incur remedial action costs as a result of the release of contaminants from the SCC Property and the migration of those contaminants onto and from the Site. Plaintiffs' remedial action costs include but are not limited to, investigation costs, response costs, remedial action costs, and the oosts of contractors, consultants, and attorneys.

28. Pursuant to RCW 70.105D.040, "[t]he owner or operator of the facility ... is strictly liable, jointly and severally, for all remedial action costs and all natural resource damages arising from the releases or threatened releases of hazardous substances." SCC and the Sullivans own and operate the SCC Property. SCC and the Sullivans are therefore strictly liable, jointly and severally, for all "remedial action" costs, within the meaning of RCW 70.105D.020(21), incurred by Plaintiffs arising from the releases or threatened releases of these hazardous substances.

29. Pursuant to RCW 70.105D.040. "[a]ny person who owned or operated the facility at the time

of disposal or release of the hazardous substances ... is strictly liable, jointly and severally, for all remedial action costs and all natural resource damages arising from the releases or threatened releases of hazardous substances." Penthouse Drapery and the Tsuchikawas owned and/or operated the facility at the time that hazardous substances were disposed or released on and from the SCC Property. Penthouse Drapery and the Tsuchikawas are therefore strictly liable, jointly and severally, for all "remedial action" costs, within the meaning of RCW 70.105D.020(21), incurred by Plaintiffs arising from the releases or threatened releases of these hazardous substances.

30. Pursuant to RCW 70.105D.040, "[a]ny person who owned or possessed a hazardous substance and who ... arranged for disposal ... of the hazardous substance at the facility" is likewise strictly liable, jointly and severally. SCC, the Sullivans, the Tsuchikawas, and Penthouse Drapery arranged for the disposal of hazardous substances at the Site and are therefore strictly liable, jointly and severally, for all of Plaintiffs' remedial action costs incurred with respect to such releases.

31. Under RCW 10.105D.080, "[a] person may bring a private right of action, including a claim for contribution or for declaratory relief against any other person liable under RCW 70.105D.040 for the recovery of remedial action costs." Defendants are liable to Plaintiffs, under RCW 70.105D.040 and 70.105D.080, for all of Plaintiffs' remedial action costs related to the releases of hazardous substances on and from the SCC

Property.

## V. SECOND CLAIM FOR RELIEF DECLARATORY JUDGMENT ON MTCA CLAIM

32. The allegations of paragraphs 1 through 31 are hereby incorporated by this reference.

33. Plaintiffs are entitled to a declaration, pursuant to MTCA and the Washington Uniform Declaratory Judgments Act, Chapter 7.24 RCW, that Defendants shall be jointly and severally responsible for and shall pay all of Plaintiffs' future remedial action costs, including but not limited to further investigation, removal, and monitoring costs that are related to releases or threatened releases of hazardous substances on and from the SCC Property.

## VI. REQUESTED RELIEF

WHEREFORE, having stated its Claims against Defendant, Plaintiffs respectfully request that the Court grant the following relief:

1. Enter judgment against Defendants for all MTCA remedial action costs incurred by Plaintiffs that are related to releases or threatened releases of hazardous substances on and from the SCC Property;

2. Enter a declaratory judgment holding Defendants jointly and severally liable for all future MTCA remedial action costs incurred by Plaintiffs that are related to the releases or threatened releases of

hazardous substances on and from the SCC Property;

3. Award Plaintiffs pre-judgment interest on an liquidated damages;

4. Award Plaintiffs their reasonable attorneys' fees and expenses related to this remedial action, and their reasonable attorneys' fees and costs relating to bringing of this action, all under RCW 70.105D.080; and

5. Such other relief as the Court finds just and equitable under the circumstances.

DATED this 19th day of October, 2007.

Davis Wright Tremaine LLP
Attorneys for Plaintiff Enodis Corp.

By /s/_____
Patricia Thompson, WSBA #23277
Cassandra Kinkead, WSBA #22845
David Ubaldi, WSBA #30180

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Attorneys for Plaintiff Belshaw Bros, Inc.

By /s/_____
John J. Houlihan, Jr., WSBA #30285

APPENDIX E

SAFECO

## COMMERCIAL GENERAL LIABILITY COVERAGE FORM

CG 00 01 1001

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V – Definitions.

SECTION I – COVERAGES
COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement.

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for

under Supplementary Payments – Coverages A and B.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The" bodily injury" or "property damage" is caused by an "occurrence" that takes place in the" coverage territory";

(2) The" bodily injury" or "property damage" occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to *have* been known prior

to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to *have* occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

(1) Reports all or any part, of the "bodily injury" or "property damage" to us or any other insurer;

(2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

(3) Becomes aware by any other

means that "bodily injury" or "property damage" has occurred or has begun to occur.

e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the bodily injury.

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in

the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statue, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability

"Bodily Injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies:

(1) Whether the insured may be liable as an employer or in any other capacity; and

(2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

f. Pollution

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

(i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot from equipment used to heat that building;

(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been

added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";

(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any

time transported, handled, stored, treated, disposed of, or processed as waste by or for:

(i) Any insured; or

(ii) Any person or organization for whom you may be legally responsible; or

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor, However, this subparagraph does not apply to:

(i) "Bodily injury" or "property damage" arising out of the

escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they

be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

(ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

(e) At or from any premises, site or location on which any insured or any

contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way

responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other

* * *

# APPENDIX F

RCW 70.105D.010
Declaration of policy.

(1) Each person has a fundamental and inalienable right to a healthful environment, and each person has a responsibility to preserve and enhance that right. The beneficial stewardship of the land, air, and waters of the state is a solemn obligation of the present generation for the benefit of future generations.

(2) A healthful environment is now threatened by the irresponsible use and disposal of hazardous substances. There are hundreds of hazardous waste sites in this state, and more will be created if current waste practices continue. Hazardous waste sites threaten the state's water resources, including those used for public drinking water. Many of our municipal landfills are current or potential hazardous waste sites and present serious threats to human health and environment. The costs of eliminating these threats in many cases are beyond the financial means of our local governments and ratepayers. The main purpose of chapter 2, Laws of 1989 is to raise sufficient funds to clean up all hazardous waste sites and to prevent the creation of future hazards due to improper disposal of toxic wastes into the state's land and waters.

(3) Many farmers and small business owners who have followed the law with respect to their uses of

pesticides and other chemicals nonetheless may face devastating economic consequences because their uses have contaminated the environment or the water supplies of their neighbors. With a source of funds, the state may assist these farmers and business owners, as well as those persons who sustain damages, such as the loss of their drinking water supplies, as a result of the contamination.

(4) It is in the public's interest to efficiently use our finite land base, to integrate our land use planning policies with our clean-up policies, and to clean up and reuse contaminated industrial properties in order to minimize industrial development pressures on undeveloped land and to make clean land available for future social use.

(5) Because it is often difficult or impossible to allocate responsibility among persons liable for hazardous waste sites and because it is essential that sites be cleaned up well and expeditiously, each responsible person should be liable jointly and severally.

(6) Because releases of hazardous substances can adversely affect the health and welfare of the public, the environment, and property values, it is in the public interest that affected communities be notified of where releases of hazardous substances have occurred and what is being done to clean them up.

[2002 c 288 § 1; 1994 c 254 § 1; 1989 c 2 § 1 (Initiative Measure No. 97, approved November 8, 1988).]

Notes:

**Severability – 2002 c 288**: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2002 c 288 § 5.]

RCW 70.105D.020
Definitions.

(1) "Agreed order" means an order issued by the department under this chapter with which the potentially liable person receiving the order agrees to comply. An agreed order may be used to require or approve any cleanup or other remedial actions but it is not a settlement under RCW 70.105D.040(4) and shall not contain a covenant not to sue, or provide protection from claims for contribution, or provide eligibility for public funding of remedial actions under RCW 70.105D.070(2)(d)(xi).

(2) "Department" means the department of ecology.

(3) "Director" means the director of ecology or the director's designee.

(4) "Environmental covenant" has the same meaning as defined in RCW 64.70.020.

(5) "Facility" means (a) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, vessel, or aircraft, or (b) any site or area where a hazardous substance, other than a consumer product in consumer use, has been deposited, stored, disposed of, or placed, or otherwise come to be located.

(6) "Federal cleanup law" means the federal comprehensive environmental response, compensation, and liability act of 1980, 42 U.S.C. Sec. 9601 et seq., as amended by Public Law 99-499.

(7)(a) "Fiduciary" means a person acting for the benefit of another party as a bona fide trustee; executor; administrator; custodian; guardian of estates or guardian ad litem; receiver; conservator; committee of estates of incapacitated persons; trustee in bankruptcy; trustee, under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee, the lender. Except as provided in subsection (17)(b)(iii) of this section, the liability of a fiduciary under this chapter shall not exceed the assets held in the fiduciary capacity.

(b) "Fiduciary" does not mean:

(i) A person acting as a fiduciary with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is engaged in, actively carrying on a trade or business for profit, unless the trust or other fiduciary estate was created as part of, or to facilitate, one or more estate plans or because of the incapacity of a natural person;

(ii) A person who acquires ownership or control of a facility with the objective purpose of avoiding liability of the person or any other person. It is prima

facie evidence that the fiduciary acquired ownership or control of the facility to avoid liability if the facility is the only substantial asset in the fiduciary estate at the time the facility became subject to the fiduciary estate;

(iii) A person who acts in a capacity other than that of a fiduciary or in a beneficiary capacity and in that capacity directly or indirectly benefits from a trust or fiduciary relationship;

(iv) A person who is a beneficiary and fiduciary with respect to the same fiduciary estate, and who while acting as a fiduciary receives benefits that exceed customary or reasonable compensation, and incidental benefits permitted under applicable law;

(v) A person who is a fiduciary and receives benefits that substantially exceed customary or reasonable compensation, and incidental benefits permitted under applicable law; or

(vi) A person who acts in the capacity of trustee of state or federal lands or resources.

(8) "Fiduciary capacity" means the capacity of a person holding title to a facility, or otherwise having control of an interest in the facility pursuant to the exercise of the responsibilities of the person as a fiduciary.

(9) "Foreclosure and its equivalents" means purchase at a foreclosure sale, acquisition, or assignment of title in lieu of foreclosure, termination

of a lease, or other repossession, acquisition of a right to title or possession, an agreement in satisfaction of the obligation, or any other comparable formal or informal manner, whether pursuant to law or under warranties, covenants, conditions, representations, or promises from the borrower, by which the holder acquires title to or possession of a facility securing a loan or other obligation.

(10) "Hazardous substance" means:

(a) Any dangerous or extremely hazardous waste as defined in *RCW 70.105.010 (5) and (6), or any dangerous or extremely dangerous waste designated by rule pursuant to chapter 70.105 RCW;

(b) Any hazardous substance as defined in *RCW 70.105.010(14) or any hazardous substance as defined by rule pursuant to chapter 70.105 RCW;

(c) Any substance that, on March 1, 1989, is a hazardous substance under section 101 (14) of the federal cleanup law, 42 U.S.C. Sec. 9601(14);

(d) Petroleum or petroleum products; and

(e) Any substance or category of substances, including solid waste decomposition products, determined by the director by rule to present a threat to human health or the environment if released into the environment.

The term hazardous substance does not include

any of the following when contained in an underground storage tank from which there is not a release: Crude oil or any fraction thereof or petroleum, if the tank is in compliance with all applicable federal, state, and local law.

(11) "Holder" means a person who holds indicia of ownership primarily to protect a security interest. A holder includes the initial holder such as the loan originator, any subsequent holder such as a successor-in-interest or subsequent purchaser of the security interest on the secondary market, a guarantor of an obligation, surety, or any other person who holds indicia of ownership primarily to protect a security interest, or a receiver, court-appointed trustee, or other person who acts on behalf or for the benefit of a holder. A holder can be a public or privately owned financial institution, receiver, conservator, loan guarantor, or other similar persons that loan money or guarantee repayment of a loan. Holders typically are banks or savings and loan institutions but may also include others such as insurance companies, pension funds, or private individuals that engage in loaning of money or credit.

(12) "Independent remedial actions" means remedial actions conducted without department oversight or approval, and not under an order, agreed order, or consent decree.

(13) "Indicia of ownership" means evidence of a security interest, evidence of an interest in a security interest, or evidence of an interest in a facility

securing a loan or other obligation, including any legal or equitable title to a facility acquired incident to foreclosure and its equivalents. Evidence of such interests includes, mortgages, deeds of trust, sellers interest in a real estate contract, liens, surety bonds, and guarantees of obligations, title held pursuant to a lease financing transaction in which the lessor does not select initially the leased facility, or legal or equitable title obtained pursuant to foreclosure and their equivalents. Evidence of such interests also includes assignments, pledges, or other rights to or other forms of encumbrance against the facility that are held primarily to protect a security interest.

(14) "Industrial properties" means properties that are or have been characterized by, or are to be committed to, traditional industrial uses such as processing or manufacturing of materials, marine terminal and transportation areas and facilities, fabrication, assembly, treatment, or distribution of manufactured products, or storage of bulk materials, that are either:

(a) Zoned for industrial use by a city or county conducting land use planning under chapter 36.70A RCW; or

(b) For counties not planning under chapter 36.70A RCW and the cities within them, zoned for industrial use and adjacent to properties currently used or designated for industrial purposes.

(15) "Institutional controls" means measures

undertaken to limit or prohibit activities that may interfere with the integrity of a remedial action or result in exposure to or migration of hazardous substances at a site. "Institutional controls" include environmental covenants.

(16) "Operating a facility primarily to protect a security interest" occurs when all of the following are met: (a) Operating the facility where the borrower has defaulted on the loan or otherwise breached the security agreement; (b) operating the facility to preserve the value of the facility as an ongoing business; (c) the operation is being done in anticipation of a sale, transfer, or assignment of the facility; and (d) the operation is being done primarily to protect a security interest. Operating a facility for longer than one year prior to foreclosure or its equivalents shall be presumed to be operating the facility for other than to protect a security interest.

(17) "Owner or operator" means:

(a) Any person with any ownership interest in the facility or who exercises any control over the facility; or

(b) In the case of an abandoned facility, any person who had owned, or operated, or exercised control over the facility any time before its abandonment;

The term does not include:

(i) An agency of the state or unit of local government which acquired ownership or control through a drug forfeiture action under RCW 69.50.505, or involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title. This exclusion does not apply to an agency of the state or unit of local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility;

(ii) A person who, without participating in the management of a facility, holds indicia of ownership primarily to protect the person's security interest in the facility. Holders after foreclosure and its equivalent and holders who engage in any of the activities identified in subsection (18)(e) through (g) of this section shall not lose this exemption provided the holder complies with all of the following:

(A) The holder properly maintains the environmental compliance measures already in place at the facility; (8) The holder complies with the reporting requirements in the rules adopted under this chapter;

(C) The holder complies with any order issued to the holder by the department to abate an imminent or substantial endangerment;

(D) The holder allows the department or potentially liable persons under an order, agreed order, or settlement agreement under this chapter

access to the facility to conduct remedial actions and does not impede the conduct of such remedial actions;

(E) Any remedial actions conducted by the holder are in compliance with any preexisting requirements identified by the department, or, if the department has not identified such requirements for the facility, the remedial actions are conducted consistent with the rules adopted under this chapter; and

(F) The holder does not exacerbate an existing release. The exemption in this subsection (17)(b)(ii) does not apply to holders who cause or contribute to a new release or threatened release or who are otherwise liable under RCW 70.105D.040(1) (b), (c), (d), and (e); provided, however, that a holder shall not lose this exemption if it establishes that any such new release has been remediated according to the requirements of this chapter and that any hazardous substances remaining at the facility after remediation of the new release are divisible from such new release;

(iii) A fiduciary in his, her, or its personal or individual capacity. This exemption does not preclude a claim against the assets of the estate or trust administered by the fiduciary or against a nonemployee agent or independent contractor retained by a fiduciary. This exemption also does not apply to the extent that a person is liable under this chapter independently of the person's ownership as a fiduciary or for actions taken in a fiduciary capacity which cause or contribute to a new release or exacerbate an

existing release of hazardous substances. This exemption applies provided that, to the extent of the fiduciary's powers granted by law or by the applicable governing instrument granting fiduciary powers, the fiduciary complies with all of the following:

(A) The fiduciary properly maintains the environmental compliance measures already in place at the facility;

(B) The fiduciary complies with the reporting requirements in the rules adopted under this chapter;

(C) The fiduciary complies with any order issued to the fiduciary by the department to abate an imminent or substantial endangerment;

(D) The fiduciary allows the department or potentially liable persons under an order, agreed order, or settlement agreement under this chapter access to the facility to conduct remedial actions and does not impede the conduct of such remedial actions;

(E) Any remedial actions conducted by the fiduciary are in compliance with any preexisting requirements identified by the department, or, if the department has not identified such requirements for the facility, the remedial actions are conducted consistent with the rules adopted under this chapter; and

(F) The fiduciary does not exacerbate an existing release.

The exemption in this subsection (17)(b)(iii) does not apply to fiduciaries who cause or contribute to a new release or threatened release or who are otherwise liable under RCW 70.105D.040(1) (b), (c), (d), and (e); provided however, that a fiduciary shall not lose this exemption if it establishes that any such new release has been remediated according to the requirements of this chapter and that any hazardous substances remaining at the facility after remediation of the new release are divisible from such new release. The exemption in this subsection (17)(b)(iii) also does not apply where the fiduciary's powers to comply with this subsection (17)(b)(iii) are limited by a governing instrument created with the objective purpose of avoiding liability under this chapter or of avoiding compliance with this chapter; or

(iv) Any person who has any ownership interest in, operates, or exercises control over real property where a hazardous substance has come to be located solely as a result of migration of the hazardous substance to the real property through the groundwater from a source off the property, if:

(A) The person can demonstrate that the hazardous substance has not been used, placed, managed, or otherwise handled on the property in a manner likely to cause or contribute to a release of the hazardous substance that has migrated onto the property;

(B) The person has not caused or contributed to the release of the hazardous substance;

(C) The person does not engage in activities that damage or interfere with the operation of remedial actions installed on the person's property or engage in activities that result in exposure of humans or the environment to the contaminated groundwater that has migrated onto the property;

(D) If requested, the person allows the department, potentially liable persons who are subject to an order, agreed order, or consent decree, and the authorized employees, agents, or contractors of each, access to the property to conduct remedial actions required by the department. The person may attempt to negotiate an access agreement before allowing access; and

(E) Legal withdrawal of groundwater does not disqualify a person from the exemption in this subsection (17)(b)(iv).

(18) "Participation in management" means exercising decision-making control over the borrower's operation of the facility, environmental compliance, or assuming or manifesting responsibility for the overall management of the enterprise encompassing the day-to-day decision making of the enterprise.

The term does not include any of the following: (a) A holder with the mere capacity or ability to influence, or the unexercised right to control facility operations; (b) a holder who conducts or requires a borrower to conduct an environmental audit or an environmental site assessment at the facility for which

indicia of ownership is held; (c) a holder who requires a borrower to come into compliance with any applicable laws or regulations at the facility for which indicia of ownership is held; (d) a holder who requires a borrower to conduct remedial actions including setting minimum requirements, but does not otherwise control or manage the borrower's remedial actions or the scope of the borrower's remedial actions except to prepare a facility for sale, transfer, or assignment; (e) a holder who engages in workout or policing activities primarily to protect the holder's security interest in the facility; (f) a holder who prepares a facility for sale, transfer, or assignment or requires a borrower to prepare a facility for sale, transfer, or assignment; (g) a holder who operates a facility primarily to protect a security interest, or requires a borrower to continue to operate, a facility primarily to protect a security interest; and (h) a prospective holder who, as a condition of becoming a holder, requires an owner or operator to conduct an environmental audit, conduct an environmental site assessment, come into compliance with any applicable laws or regulations, or conduct remedial actions prior to holding a security interest is not participating in the management of the facility.

(19) "Person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, state government agency, unit of local government, federal government agency, or Indian tribe.

(20) "Policing activities" means actions the

holder takes to ensure that the borrower complies with the terms of the loan or security interest or actions the holder takes or requires the borrower to take to maintain the value of the security. Policing activities include: Requiring the borrower to conduct remedial actions at the facility during the term of the security interest; requiring the borrower to comply or come into compliance with applicable federal, state, and local environmental and other laws, regulations, and permits during the term of the security interest; securing or exercising authority to monitor or inspect the facility including on-site inspections, or to monitor or inspect the borrower's business or financial condition during the term of the security interest; or taking other actions necessary to adequately police the loan or security interest such as requiring a borrower to comply with any warranties, covenants, conditions, representations, or promises from the borrower.

(21) "Potentially liable person" means any person whom the department finds, based on credible evidence, to be liable under RCW 70.105D.040. The department shall give notice to any such person and allow an opportunity for comment before making the finding, unless an emergency requires otherwise.

(22) "Prepare a facility for sale, transfer, or assignment" means to secure access to the facility; perform routine maintenance on the facility; remove inventory, equipment, or structures; properly maintain environmental compliance measures already in place at the facility; conduct remedial actions to clean up releases at the facility; or to perform other similar

activities intended to preserve the value of the facility where the borrower has defaulted on the loan or otherwise breached the security agreement or after foreclosure and its equivalents and in anticipation of a pending sale, transfer, or assignment, primarily to protect the holder's security interest in the facility. A holder can prepare a facility for sale, transfer, or assignment for up to one year prior to foreclosure and its equivalents and still stay within the security interest exemption in subsection (17)(b)(ii) of this section.

(23) "Primarily to protect a security interest" means the indicia of ownership is held primarily for the purpose of securing payment or performance of an obligation. The term does not include indicia of ownership held primarily for investment purposes nor indicia of ownership held primarily for purposes other than as protection for a security interest. A holder may have other, secondary reasons, for maintaining indicia of ownership, but the primary reason must be for protection of a security interest. Holding indicia of ownership after foreclosure or its equivalents for longer than five years shall be considered to be holding the indicia of ownership for purposes other than primarily to protect a security interest. For facilities that have been acquired through foreclosure or its equivalents prior to July 23, 1995, this five-year period shall begin as of July 23, 1995.

(24) "Public notice" means, at a minimum, adequate notice mailed to all persons who have made timely request of the department and to persons

residing in the potentially affected vicinity of the proposed action; mailed to appropriate news media; published in the newspaper of largest circulation in the city or county of the proposed action; and opportunity for interested persons to comment.

(25) "Release" means any intentional or unintentional entry of any hazardous substance into the environment, including but not limited to the abandonment or disposal of containers of hazardous substances.

(26) "Remedy" or "remedial action" means any action or expenditure consistent with the purposes of this chapter to identify, eliminate, or minimize any threat or potential threat posed by hazardous substances to human health or the environment including any investigative and monitoring activities with respect to any release or threatened release of a hazardous substance and any health assessments or health effects studies conducted in order to determine the risk or potential risk to human health.

(27) "Security interest" means an interest in a facility created or established for the purpose of securing a loan or other obligation. Security interests include deeds of trusts, sellers interest in a real estate contract, liens, legal, or equitable title to a facility acquired incident to foreclosure and its equivalents, and title pursuant to lease financing transactions. Security interests may also arise from transactions such as sale and leasebacks, conditional sales, installment sales, trust receipt transactions, certain

assignments, factoring agreements, accounts receivable financing arrangements, easements, and consignments, if the transaction creates or establishes an interest in a facility for the purpose of securing a loan or other obligation.

(28) "Workout activities" means those actions by which a holder, at any time prior to foreclosure and its equivalents, seeks to prevent, cure, or mitigate a default by the borrower or obligor; or to preserve, or prevent the diminution of, the value of the security. Workout activities include: Restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an assignment of accounts or other amounts owed to an obligor; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owed to an obligor; providing specific or general financial or other advice, suggestions, counseling, or guidance; and exercising any right or remedy the holder is entitled to by law or under any warranties, covenants, conditions, representations, or promises from the borrower.

[2007 c 104 § 18; 2005 c 191 § 1; 1998 c 6 § 1; 1997 c 406 § 2; 1995 c 70 § 1; 1994 c 254 § 2; 1989 c 2 § 2 (Initiative Measure No. 97, approved November 8, 1988).]

Notes:

*Reviser's note: Due to the alphabetization of

RCW 70.105.010 pursuant to RCW 1.08.015(2)(k), subsections (5), (6), and (14) were changed to subsections (1), (7), and (10) respectively.

**Application – Construction – Severability – 2007 c 104:** See RCW 64.70.015 and 64.70.900.

RCW 70.105D.040
Standard of liability – Settlement.

(1) Except as provided in subsection (3) of this section, the following persons are liable with respect to a facility:

(a) The owner or operator of the facility;

(b) Any person who owned or operated the facility at the time of disposal or release of the hazardous substances;

(c) Any person who owned or possessed a hazardous substance and who by contract, agreement, or otherwise arranged for disposal or treatment of the hazardous substance at the facility, or arranged with a transporter for transport for disposal or treatment of the hazardous substances at the facility, or otherwise generated hazardous wastes disposed of or treated at the facility;

(d) Any person (i) who accepts or accepted any hazardous substance for transport to a disposal, treatment, or other facility selected by such person from which there is a release or a threatened release for which remedial action is required, unless such facility, at the time of disposal or treatment, could legally receive such substance; or (ii) who accepts a hazardous substance for transport to such a facility and has reasonable grounds to believe that such facility is not operated in accordance with chapter 70.105 RCW; and

(c) Any person who both sells a hazardous substance and is responsible for written instructions for its use if (i) the substance is used according to the instructions and (ii) the use constitutes a release for which remedial action is required at the facility.

(2) Each person who is liable under this section is strictly liable, jointly and severally, for all remedial action costs and for all natural resource damages resulting from the releases or threatened releases of hazardous substances. The attorney general, at the request of the department, is empowered to recover all costs and damages from persons liable therefor.

(3) The following persons are not liable under this section:

(a) Any person who can establish that the release or threatened release of a hazardous substance for which the person would be otherwise responsible was caused solely by:

(i) An act of God;

(ii) An act of war; or

(iii) An act or omission of a third party (including but not limited to a trespasser) other than (A) an employee or agent of the person asserting the defense, or (8) any person whose act or omission occurs in connection with a contractual relationship existing, directly or indirectly, with the person asserting this defense to liability. This defense only applies where

the person asserting the defense has exercised the utmost care with respect to the hazardous substance, the foreseeable acts or omissions of the third party, and the foreseeable consequences of those acts or omissions;

(b) Any person who is an owner, past owner, or purchaser of a facility and who can establish by a preponderance of the evidence that at the time the facility was acquired by the person, the person had no knowledge or reason to know that any hazardous substance, the release or threatened release of which has resulted in or contributed to the need for the remedial action, was released or disposed of on, in, or at the facility. This subsection (b) is limited as follows:

(i) To establish that a person had no reason to know, the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property, consistent with good commercial or customary practice in an effort to minimize liability. Any court interpreting this subsection (b) shall take into account any specialized knowledge or experience on the part of the person, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection;

(ii) The defense contained in this subsection (b)

is not available to any person who had actual knowledge of the release or threatened release of a hazardous substance when the person owned the real property and who subsequently transferred ownership of the property without first disclosing such knowledge to the transferee;

(iii) The defense contained in this subsection (b) is not available to any person who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance at the facility;

(c) Any natural person who uses a hazardous substance lawfully and without negligence for any personal or domestic purpose in or near a dwelling or accessory structure when that person is: (i) A resident of the dwelling; (ii) a person who, without compensation, assists the resident in the use of the substance; or (iii) a person who is employed by the resident, but who is not an independent contractor;

(d) Any person who, for the purpose of growing food crops, applies pesticides or fertilizers without negligence and in accordance with all applicable laws and regulations.

(4) There may be no settlement by the state with any person potentially liable under this chapter except in accordance with this section.

(a) The attorney general may agree to a settlement with any potentially liable person only if

the department finds, after public notice and any required hearing, that the proposed settlement would lead to a more expeditious cleanup of hazardous substances in compliance with cleanup standards under RCW 70.105D.030(2)(e) and with any remedial orders issued by the department. Whenever practicable and in the public interest, the attorney general may expedite such a settlement with persons whose contribution is insignificant in amount and toxicity. A hearing shall be required only if at least ten persons request one or if the department determines a hearing is necessary.

(b) A settlement agreement under this section shall be entered as a consent decree issued by a court of competent jurisdiction.

(c) A settlement agreement may contain a covenant not to sue only of a scope commensurate with the settlement agreement in favor of any person with whom the attorney general has settled under this section. Any covenant not to sue shall contain a reopener clause which requires the court to amend the covenant not to sue if factors not known at the time of entry of the settlement agreement are discovered and present a previously unknown threat to human health or the environment.

(d) A party who has resolved its liability to the state under this section shall not be liable for claims for contribution regarding matters addressed in the settlement. The settlement does not discharge any of the other liable parties but it reduces the total

potential liability of the others to the state by the amount of the settlement.

(e) If the state has entered into a consent decree with an owner or operator under this section, the state shall not enforce this chapter against any owner or operator who is a successor in interest to the settling party unless under the terms of the consent decree the state could enforce against the settling party, if:

(i) The successor owner or operator is liable with respect to the facility solely due to that person's ownership interest or operator status acquired as a successor in interest to the owner or operator with whom the state has entered into a consent decree; and

(ii) The stay of enforcement under this subsection does not apply if the consent decree was based on circumstances unique to the settling party that do not exist with regard to the successor in interest, such as financial hardship. For consent decrees entered into before July 27, 1997, at the request of a settling party or a potential successor owner or operator, the attorney general shall issue a written opinion on whether a consent decree contains such unique circumstances. For all other consent decrees, such unique circumstances shall be specified in the consent decree.

(f) Any person who is not subject to enforcement by the state under (e) of this subsection is not liable for claims for contribution regarding matters addressed in the settlement.

(5)(a) In addition to the settlement authority provided under subsection (4) of this section, the attorney general may agree to a settlement with a person not currently liable for remedial action at a facility who proposes to purchase, redevelop, or reuse the facility, provided that:

(i) The settlement will yield substantial new resources to facilitate cleanup;

(ii) The settlement will expedite remedial action consistent with the rules adopted under this chapter; and

(iii) Based on available information, the department determines that the redevelopment or reuse of the facility is not likely to contribute to the existing release or threatened release, interfere with remedial actions that may be needed at the site, or increase health risks to persons at or in the vicinity of the site.

(b) The legislature recognizes that the state does not have adequate resources to participate in all property transactions involving contaminated property. The primary purpose of this subsection (5) is to promote the cleanup and reuse of vacant or abandoned commercial or industrial contaminated property. The attorney general and the department may give priority to settlements that will provide a substantial public benefit, including, but not limited to the reuse of a vacant or abandoned manufacturing or industrial facility, or the development of a facility by

a governmental entity to address an important public purpose.

(6) Nothing in this chapter affects or modifies in any way any person's right to seek or obtain relief under other statutes or under common law, including but not limited to damages for injury or loss resulting from a release or threatened release of a hazardous substance. No settlement by the department or remedial action ordered by a court or the department affects any person's right to obtain a remedy under common law or other statutes.

[1997 c 406 § 4; 1994 c 254 § 4; 1989 c 2 § 4 (Initiative Measure No. 97, approved November 8, 1988).]

RCW 70.105D.080
Private right of action – Remedial action costs.

Except as provided in RCW 70.105D.040(4) (d) and (t), a person may bring a private right of action, including a claim for contribution or for declaratory relief, against any other person liable under RCW 70.105D.040 for the recovery of remedial action costs. In the action, natural resource damages paid to the state under this chapter may also be recovered. Recovery shall be based on such equitable factors as the court determines are appropriate. Remedial action costs shall include reasonable attorneys' fees and expenses. Recovery of remedial action costs shall be limited to those remedial actions that, when evaluated as a whole, are the substantial equivalent of a department-conducted or department-supervised remedial action. Substantial equivalence shall be determined by the court with reference to the rules adopted by the department under this chapter. An action under this section may be brought after remedial action costs are incurred but must be brought within three years from the date remedial action confirms cleanup standards are met or within one year of May 12, 1993, whichever is later. The prevailing party in such an action shall recover its reasonable attorneys' fees and costs. This section applies to all causes of action regardless of when the cause of action may have arisen. To the extent a cause of action has arisen prior to May 12, 1993, this section applies retroactively, but in all other respects it applies prospectively.

[1997 c 406 § 6; 1993 c 326 § 1.]

Notes:

**Effective date – 1993 c 326**: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [May 12, 1993]." [1993 c 326 § 2.]

**Severability – 1993 c 326**: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1993 c 326 § 3.]

1800 (2)

No. 10-1189

In The

# Supreme Court of the United States

SEATTLE COLLISION CENTER, INC.;
TODD M. SULLIVAN AND KAREN SULLIVAN,

*Petitioners,*

v.

AMERICAN STATES INSURANCE COMPANY;
AND SAFECO INSURANCE COMPANY OF AMERICA,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION


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## QUESTIONS PRESENTED

I. Whether the Ninth Circuit Court of Appeals correctly applied Washington law to affirm the district court's partial grant of summary judgment dismissing Petitioners' claims against Respondents, because the complaint underlying Petitioners' insurance coverage claim did not allege facts triggering a duty to defend or to indemnify under Washington law.

II. Whether the Ninth Circuit Court of Appeals correctly applied clear and unambiguous exclusionary language in Respondents' insurance policies, as construed under binding Washington State Supreme Court authority, to bar claims for insurance coverage asserted by Petitioners pursuant to Washington law.

## CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Pursuant to Supreme Court Rule 29.6, Respondents American States Insurance Company and Safeco Insurance Company of America identify these parent corporations:

American States Insurance Company is a company organized under the laws of the State of Indiana and for federal court jurisdiction/diversity of citizenship disclosure purposes, the principal place of business is 175 Berkeley Street, Boston, Massachusetts.

- American States Insurance Company is wholly owned by Safeco Corporation.
- Liberty Mutual Agency Corporation owns 100% of the shares of Safeco Corporation.
- Liberty Mutual Agency Corporation is wholly owned by Liberty Insurance Holdings, Inc.
- Liberty Mutual Insurance Company owns 100% of the stock of Liberty Insurance Holdings, Inc.
- Liberty Mutual Group Inc. owns 100% of the stock of Liberty Mutual Insurance Company.
- LMHC Massachusetts Holdings Inc. owns 100% of the stock of Liberty Mutual Group Inc.
- Liberty Mutual Holding Company Inc. owns 100% of the stock of LMHC Massachusetts Holdings Inc.

## CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6 – Continued

Safeco Insurance Company of America is a company organized under the laws of the State of Washington and for federal court jurisdiction/diversity of citizenship disclosure purposes, the principal place of business is 175 Berkeley Street, Boston, Massachusetts.

- Liberty Mutual Agency Corporation owns 100% of the shares of Safeco Corporation.
- Liberty Mutual Agency Corporation is wholly owned by Liberty Insurance Holdings, Inc.
- Liberty Mutual Insurance Company owns 100% of the stock of Liberty Insurance Holdings, Inc.
- Liberty Mutual Group Inc. owns 100% of the stock of Liberty Mutual Insurance Company.
- LMHC Massachusetts Holdings Inc. owns 100% of the stock of Liberty Mutual Group Inc.
- Liberty Mutual Holding Company Inc. owns 100% of the stock of LMHC Massachusetts Holdings Inc.

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## STATEMENT OF THE CASE

In October 2007, neighboring landowners sued Seattle Collision Center, Inc., Todd M. Sullivan and Karen Sullivan (hereinafter, collectively "SCC") in a Washington State court under Washington State's Model Toxic Control Act ("MTCA") ("Underlying Lawsuit"). Pet. App. at 38-47. The Underlying Lawsuit presented a MTCA "private right of action" claim for contribution and declaratory relief for past and future remedial action costs from SCC for alleged contamination of soils and groundwater caused by the release of volatile organic compounds, specifically the pollutant perchlorethylene ("PERC"). *Id.*

The Underlying Lawsuit complaint only mentions "natural resource damages" in paragraphs 28 and 29 and only in the context of quoting the MTCA statute upon which the Underlying Lawsuit claims for remedial action costs are based. Pet. App. at 44-45.[1] In both paragraphs, the sentence that immediately follows the MTCA citation makes it clear, however, that the alleged liability under MTCA was limited to "remedial action costs." *Id.* Further, the complaint only requests relief for past and future remedial action costs, although it includes the generic request for "such other relief as the court deems just." Pet. App. at 46-47. The complaint neither alleges liability nor requests relief for

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[1] Paragraph 29 is not even directed at SCC, but rather another defendant in the Underlying Lawsuit.

"natural resource damages." *See, generally,* Pet. App. at 38-47.

SCC first tendered defense and indemnity of the Underlying Lawsuit to Oregon Mutual Insurance Company ("OMI"). Pet. App. at 10. SCC subsequently tendered to the Respondents American States Insurance Company and Safeco Insurance Company of America (collectively, the "Safeco Insurers"). *Id.* The Safeco Insurers denied coverage because their six policies at issue each contained a pollution exclusion with exclusionary language barring coverage for pollution liability such as a PERC release. Pet. App. at 9-10.

In November 2008, OMI sued SCC in the Western District of Washington based on diversity jurisdiction, seeking a declaratory judgment that OMI had no insurance coverage obligations in relation to SCC's traditional pollution liability claim. Pet. App. at 11. SCC counterclaimed against OMI and filed a third-party complaint against the Safeco Insurers alleging Washington state law claims of breach of contract, negligence, insurance bad faith, and violations of Washington statutory law. *Id.*

In April 2009, the Safeco Insurers filed a motion for summary judgment dismissal of SCC's claims based on the Washington State Supreme Court's interpretation of the unambiguous policy language in each implicated policies' pollution exclusion. Pet. App. at 12. On September 18, 2009, the district court issued an Order dismissing the majority of SCC's

claims against the Safeco Insurers, including all insurance coverage claims. Pet. App. at 7 n.1. On October 28, 2009, the district court filed an Amended Order to correct a misstatement of Washington law. Pet. App. at 6-37. In the Amended Order, the district court ruled that the policies' pollution exclusions "clearly and unambiguously exclude coverage for the remediation claims" at issue. Pet. App. at 22. With respect to SCC's "hypothetical" non-remediation claims, the district court stated as follows:

> The court is not persuaded that the Underlying Complaint, even construed liberally, alleges a claim for natural resource damages or other, non-remediation claims. Nevertheless, the court need not resolve this issue because, even accepting Seattle Collision and the Sullivans's characterization of the Underlying Complaint, the modified absolute pollution exclusion clauses exclude coverage for any such non-remediation claims.

Pet. App. at 23. Concluding that no coverage existed under the Safeco Insurers' policies, the court dismissed the majority of SCC's claims. *See, generally*, Pet. App. at 6-37. The parties then stipulated to dismissal of SCC's limited remaining claims to facilitate SCC's appeal to the Ninth Circuit, which affirmed the disposition. Pet. App. at 4-5.

## REASONS FOR DENYING THE PETITION

Despite Petitioners' efforts to wrap this case in the mantle of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), this matter involves a simple application of state substantive law to an insurance issue that does not merit consideration by this Court. Both the district court and court of appeals correctly articulated and applied binding Washington State Supreme Court precedent to dismiss insurance coverage claims that fall within the exclusionary language of an insurance policy. The case presents no federal question. Therefore, "compelling reasons" do not exist for this Court to grant the petition for a writ of certiorari. *See* Sup. Ct. R. 10. Furthermore, even a misapplication of Washington law would not merit review, because a petition for a writ of certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

### I. The *Erie* Doctrine Has No Bearing On SCC's Petition, Because The Lower Courts Correctly Articulated And Applied Washington Law.

Pursuant to the *Erie* Doctrine, a federal court sitting in diversity must apply the substantive law of the state. *E.g., Erie R. Co. v. Tompkins*, 304 U.S. at 79-80. *See also Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991) (court of appeals considers the issues on appeal *de novo* without deference to the district court's determination of state law). Here, both

the district court and court of appeals did just that. They independently applied Washington state law to rule that SCC was not entitled to insurance coverage under the policies issued by the Safeco Insurers. Because the courts applied the substantive law of Washington, the lower court decisions are not in conflict with the *Erie* Doctrine.

As Petitioners point out, the *Erie* Doctrine is rooted in concepts of fairness, with its twin aims of "discouragement of forum shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 457 (1965). However, the Safeco Insurers did not choose the forum for Petitioners' claims and the lower courts correctly applied state law to this diversity action. Therefore, fairness is not an issue.

This Court has stated it normally will not grant a petition for a writ of certiorari to review what purports to be a federal court's application of state law except for the "extraordinary circumstance" of blatant federal court nullification of state law. *See, e.g., Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996). SCC's petition does not present such an "extraordinary circumstance." Rather, SCC's petition is fundamentally flawed for two primary reasons: (1) SCC misconstrues Washington's notice pleading standard required to withstand a Rule 12(b)(6) dismissal motion and confuses it with Washington's separate *Woo* standard for determining an insurer's duty to defend; and (2) the Underlying Lawsuit complaint does not

trigger a duty to defend regardless of the Washington standard as applied to this case.

## II. SCC Misconstrues Washington's Notice Pleading Standard And Confuses It With Washington's *Woo* Standard For Determining An Insurer's Duty To Defend.

Contrary to SCC's characterization of Washington's notice pleading standard, a Washington complainant cannot obtain damages not pled simply on the basis of a boilerplate prayer "for such other relief as the Court deems just and equitable" at the end of a complaint. In *Champagne v. Thurston County*, 178 P.3d 936, 945-46 (Wash. 2008), the Washington State Supreme Court considered whether the plaintiff Champagne's complaint sufficiently pled claims under Washington's Minimum Wage Act ("MWA") and Wage Payment Act ("WPA"). The complaint alleged various causes of action based on Washington statutes violated by "Defendant Thurston County's action in failing to pay the due and payable wage payments" entitled to the plaintiff, including causes of action under the MWA and WPA. *Id.* at 946. Thus, the complaint made direct factual allegations regarding specific statutory violations that gave notice to Thurston County that plaintiff sought relief for such claims.

Champagne's prayer for relief did not expressly pray for damages based on MWA or WPA damages, but did include a prayer for other statutory remedies

as well as "such other relief as the Court deems just and equitable." *Id.* Noting that whether a complaint satisfies the notice pleading standard is factually driven, the court reasoned:

> The County argues persuasively that *a generic prayer for relief does not provide adequate notice to the opposing party of a particular remedy.* However, the entirety of Champagne's complaint supplies *direct allegations* sufficient to give notice to both the court and the County that Champagne sought relief under the MWA, WPA, and WRA.

*Id.* (emphasis added). The court held that "the totality of Champagne's complaint comports with notice pleading rules and that review of the causes of action under the MWA and WPA in addition to the WRA is appropriate." *Id.* Based on its conclusion that the complaint alleged direct allegations of fact to give notice on the MWA and WPA claims, the *Champagne* Court then analyzed the substantive statutory arguments presented to it on appeal.

SCC's petition presents a completely different issue. Here, the Underlying Lawsuit complaint mentions "natural resource damages" in paragraphs 28 and 29, but only in the context of quoting the statute upon which the Underlying Lawsuit's claim for remedial action costs is based. Pet. App. at 44-45. Those same paragraphs of the complaint make clear that the Underlying Lawsuit does not allege liability for natural resource damages, but rather only alleges

that the defendants "are therefore strictly liable . . . for all "remedial action costs." *Id.* SCC admits this. *See* Pet. at 16 ("SCC does not dispute that the complaint in the Underlying lawsuit [sic] does not *explicitly demand* natural resource damages") (emphasis in original). Thus, both parties agree that the Underlying Lawsuit complaint does not present the direct factual allegations required under *Champagne* to satisfy Washington's notice pleading standard for a natural resource damages claim.

*McCurry v. Chevy Chase Bank*, 233 P.3d 861, 862-64 (Wash. 2010), another case cited by Petitioners, follows the long-standing notice pleading standard articulated in *Champagne* and also requires direct factual allegations within the complaint to avoid a Rule 12(b)(6) dismissal. According to the *McCurry* Court, "Under CR 12(b)(6) a plaintiff states a claim upon which relief can be granted if it is *possible* that facts could be established to support **the allegations in the complaint**." *McCurry*, 233 P.3d at 863 (italics in original, bold underscore added), *citing Halvorson v. Dahl*, 574 P.2d 1190 (Wash. 1978). As discussed, this standard has not been met in this case. Therefore, the pleading standard articulated in *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), is not relevant to the issues presented by SCC's petition for a writ of certiorari.

More importantly, Washington's notice pleading standard is distinct from the separate question of whether an underlying lawsuit complaint triggers

insurance obligations under an insurance policy. Both *McCurry* and *Champagne* considered the issue of notice pleading sufficiency in the face of a motion to dismiss. At issue in this case is whether an Underlying Lawsuit complaint triggers a duty to defend. As to that issue, the rule in Washington is that an insurer must defend if the factual allegations in the complaint, if proven, would conceivably be covered. *American Best Food, Inc. v. Alea London, Ltd.*, 229 P.3d 693, 696 (Wash. 2010), *citing Woo v. Fireman's Fund Ins. Co.*, 164 P.3d 454 (Wash. 2007). The duty to defend an underlying lawsuit "'arises when a complaint against the insured, construed liberally, *alleges facts* which could, if proven, impose liability upon the insured within the policy's coverage.'" *Id.* (internal references omitted) (emphasis added).

Here, as discussed below, the Underlying Lawsuit complaint does not allege facts that, if proven, could impose liability upon the insured within the policies' coverage, whether for natural resource damages or otherwise. Therefore, SCC's petition is boldly asking this Court to anticipate whether a Washington court would hold that boilerplate language requesting "such other and further relief" as a Washington court deems just, without additional complaint allegations, creates a legal claim against which an insurer is required to defend. No Washington court has done so to date and, nationwide, the black letter rule is that such boilerplate language is insufficient to trigger insurance coverage obligations. *E.g., York Golf and Tennis Club v. Tudor Ins. Co.*, 845

A.2d 1173, 1177 n.1 (Me. 2004) ("a request for 'such other and further relief as the court may deem just and proper' . . . would not be enough to establish a duty to defend"); *Feed Store, Inc. v. Reliance Ins. Co.*, 774 S.W.2d 73, 74-75 (Tex.App. – Houston 1989) ("If the boilerplate conclusion in Dairy Queen's complaint encompasses a request for money damages, then we suppose every lawsuit ever filed also sought damages. And there would be no reason to confine the content of invisible allegations to damages. All lawsuits seeking "other and further relief" would precipitate a duty to defend.").

## III. The Underlying Lawsuit Complaint Does Not Satisfy Washington's *Woo* Standard To Trigger A Duty To Defend Regardless Of Whether The Underlying Lawsuit Alleges Natural Resource Damages.

Under Washington law, SCC's traditional pollution liability claim is not covered by Respondents' policies. The Washington State Supreme Court recognizes that an absolute pollution exclusion bars coverage for pollution liability arising out of "traditional environmental harm." *See, e.g.*, *Quadrant Corp. v. Am. States Ins. Co.*, 110 P.3d 733 (Wash. 2005); *Kent Farms, Inc. v. Zurich Ins. Co.*, 998 P.2d 292, 293 (Wash. 2000). As with the Safeco Insurers' policies here, the pollution exclusion language construed in both *Kent Farms* and *Quadrant* bars coverage for bodily injury or property damage "arising out of the actual, alleged or threatened discharge, dispersal,

seepage, migration, release or escape of pollutants." Compare *Quadrant*, 110 P.3d at 736, and *Kent Farms*, 998 P.2d at 294, with Pet. App. at 56. The *Kent Farms* Court summarized the effect of this exclusionary language as follows:

> The exclusion, when viewed in the context of its purpose, does not apply merely because a potential pollutant was involved in the causal chain. Instead, the exclusion applies to "occurrences" involving the pollutant as a pollutant. Our approach is consonant with the understanding of the average purchaser of insurance and consistent with the provisions of the insurance policy as a whole; that is, the pollution exclusion clause was designed to exclude coverage for traditional environmental harms.

998 P.2d at 296. In short, the *Kent Farms* Court concluded that the exclusion was designed to preclude coverage in the case of traditional environmental harms or where the pollutant acted as a pollutant.[2]

SCC's coverage claim is exactly the type of claim to which the *Kent Farms* Court pointed when discussing the intent of such a pollution exclusion, because SCC only seeks coverage for liability due to traditional environmental harms. SCC does not dispute that

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[2] The *Quadrant* Court later clarified that the exclusion is even broader and "clearly applies to bodily injury and property damage; it is not limited to actions for cleanup costs." 110 P.3d at 741.

remedial action costs are not covered. *See*, *e.g.*, Pet. App. at 22 ("Here, the parties agree that the policies do not provide coverage for the remediation claims alleged by the Underlying Plaintiffs"). Regarding SCC's baseless contention that the Underlying Lawsuit complaint alleges natural resource damages, such damages still fall within the policies' definition of "property damage" as "physical injury to tangible property, including all resulting loss of use of that property." In fact, SCC strenuously argued and admitted this fact to the district court. *See* Pet. App. at 24-25 ("'Property damage' is a defined term under the insurance policies, and the parties agree that a claim for natural resource damages, whether or not actually asserted in the Underlying Complaint, constitutes a claim for "property damage" as characterized by Seattle Collision and the Sullivans."). Therefore, even if alleged by the Underlying Plaintiffs, natural resource damages would be excluded under the Safeco Insurers' pollution exclusions as "'property damage' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants.'" *Id.*

In short, SCC claims liability coverage for MTCA remedial action costs (and arguably natural resource damages) relating to alleged property damage from contamination of groundwater and land by PERC. SCC not only cannot dispute but also has admitted the fact that its claim seeks coverage for property damage arising out of the release of a pollutant – in other words, traditional environmental harm. As a

result, and as the Ninth Circuit recognized, SCC's citation to *Alea*, 229 P.3d at 697-98, is misplaced, because no "legal uncertainty" exists as to how a Washington court construes the pollution exclusion language at issue in this case. Therefore, the absolute pollution exclusions contained in the Safeco Insurers' policies bar coverage for the claim, and the lower courts' rulings are grounded in solid Washington state law.

## CONCLUSION

The petition fails to establish any justification for this Court to review the lower courts' rulings on state law questions brought under diversity jurisdiction. This case does not present a true federal question, a conflict among the circuits, or a conflict with this Court's precedent. Therefore, Respondents respectfully request that this Court deny SCC's petition for a writ of certiorari.

Respectfully submitted,

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